GO BIG AND GO HOME, TRANSFORMATIONAL MIXED-USE DEVELOPMENTS AND THE EFFICACY OF OHIO HOUSE BILL 469

DUSTIN W. MEEKS*

I. INTRODUCTION

In February 2018, Ohio State Representative Thomas Patton (R-Strongsville) and State Senator Kirk Schuring (R-Canton) introduced Ohio House Bill 469 (H.B. 469).[1] The bill proposes the creation of a tax credit against Ohio's insurance premiums tax valued at ten percent of the development costs of a "transformational mixed-use development."[2] The proposal was inspired by a development project proposed in downtown Cleveland, Ohio which would qualify for the credit if enacted.[3] The bill passed the State House of Representatives during the 2018 legislative session but has not yet passed the State Senate.[4] It will be considered further during the 2019 session as the house-passed version of the bill has been reintroduced as Ohio Senate Bill 39 (S.B. 39).[5] If enacted, H.B. 469 would represent only the second state with a tax-credit targeted directly at mixed-use development, and the other existing program in Pennsylvania is insignificant in comparison to the credit program proposed in H.B. 469.[6] Mixed-use development is a form of real estate project

---

* *Juris Doctor Candidate*, 2020, The Ohio State University Michael E. Moritz College of Law.

[1] *House Bill 469*, OHIO LEGISLATURE, https://www.legislature.ohio.gov/legislation/legislation-committee-documents?id=GA132-HB-469 (last visited Jan. 18, 2019).

[2] H.B. 469, 132nd Gen. Assemb., Reg. Sess. (Ohio 2018) (as introduced).

[3] Michelle Jarboe, *Cleveland's NuCLEus Project Appears to be Target of Proposed Tax Credit for 'Transformational' Deals*, CLEV. PLAIN DEALER (Mar. 23, 2018), http://realestate.cleveland.com/realestate-news/2018/03/clevelands_nucleus_project_app.html.

[4] Jay Miller, *Five Business Friendly Bills Languish as Ohio General Assembly Lame-duck Session Winds Down*, CRAIN'S CLEV. BUS. (Nov. 18, 2018), https://www.crainscleveland.com/government/five-business-friendly-bills-languish-ohio-general-assembly-lame-duck-session-winds-down.

[5] S.B 39, 133rd Gen. Assemb., Reg. Session (Ohio 2019) (as introduced); H.B. 469, 132nd Gen. Assemb., Reg. Sess. (Ohio 2018) (as passed by the house).

[6] *See* 72 PA. CONS. STAT. § 8907-E (LEXIS through 2018 Reg. Sess. Acts 1-87, 89-94, 97, 105, 107, 108, 111, 115, 124, 128, 131, 132, 145, 156, 158, 161, 163, 164).

development with history extending back to at least the 1950's which has been refined over time[7] and which has the potential to address a variety of challenges that face communities related to economic blight in urban settings and the social and environmental costs of urban sprawl.[8] In the author's view, while the costs of the credit proposed by H.B. 469 have the potential to be quite substantial, the benefits in economic, social, and environmental terms of incentivizing mixed-use in development in Ohio make passage of H.B. 469 a worthwhile action by the Ohio General Assembly. And further, in view of the structure of similarly motivated tax credits currently enacted both in Ohio and in other states, the General Assembly should consider an expansion of the credit's applicability, transferability, or carry forward to enhance the proposed program's power to incentivize transformational mixed-use development.

II. "Transformational Mixed-use Development" Defined

A. *Mixed-use Developments*

1. *The Rise of the American Suburb*

A white picket fence, a little house with a green well-manicured yard, 2.5 children and a dog; these seem as emblematic of Americana as anything, and they symbolize, in our nostalgic collective memory, both achievement and contentment. This bourgeois vision is reflected in a trend that has proceeded throughout the latter half of the twentieth century of increasing dispersion of both economic activity and residential life with falling population densities and growing quantities of space dedicated to individual residences.[9] While the late nineteenth century saw a boom of the American urban center with growth of urban spaces accounting for 15.3% of the national population in 1850 growing to 39.7% in 1900 largely due to population concentration

---

[7] Dean Schwanke et al., Mixed-Use Development Handbook (Barbara M. Fishel et al. eds., 1987).

[8] Luis Zamorano & Erika Culpa, *People-Oriented Cities: Mixed-Use Development Creates Social and Economic Benefits*, World Resources Inst. (July 23, 2014), https://www.wri.org/blog/2014/07/people-oriented-cities-mixed-use-development-creates-social-and-economic-benefits.

[9] Sukkoo Kim, *Urban Development in the United States 1690-1990*, 66 S. Econ. J 855, 878 (2000).

around new manufacturing facilities.[10] The post-war period saw the rise of the modern suburban community spurred by the Federal Housing Administration's mortgage insurance program, mass produced structures, and the baby boom.[11]

Contrary to American planning norms of the late twentieth and early twenty-first centuries,[12] in the long arc of history, lack of transportation and the necessities of defense have made compact and highly integrated multi-use spaces the norm for urban spaces.[13] This norm goes back to medieval fortress cities and can be seen in older American cities such as New York which features tight integrations of retail, entertainment, hotel, office, and residential spaces over the entire island of Manhattan.[14] As industrial production concentrated ever greater numbers into cities, quality of life suffered due to "congestion, pollution and generally poor urban conditions."[15] In response to these challenges, the discipline of urban planning came into its own with zoning taking hold as a dominant tool for keeping industry and residential spaces separate.[16] During the whole 20th century, urban planning maintained a system of keeping uses separate and "in their places in the urban environment."[17]

In *Village of Euclid v. Ambler Realty Company*, the Supreme Court upheld regulations promulgated by a suburb of Cleveland, Ohio.[18] The Court held that the police power granted to municipalities by their respective states gives them the ability to promulgate such zoning laws as can be fairly debated to have a *substantial relation to the public health, safety, morals, or general welfare*.[19] The Court declared that laws which separated industrial neighborhoods from residential

---

10 Jonathon Rees, *Industrialization and Urbanization in the United States, 1880-1929*, OXFORD RES. ENCYCLOPEDIA AM. HIST. (July 2016), http://americanhistory.oxfordre.com/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-327.

11 Becky Nolaides & Andrew Wiese, *Suburbanization in the United States After 1945*, OXFORD RES. ENCYCLOPEDIA AM. HIST. (Apr. 2017), http://americanhistory.oxfordre.com/view/10.1093/acrefore/9780199329175.001.0001/acrefore-9780199329175-e-64.

12 *See generally id.*

13 SCHWANKE ET AL., *supra* note 7, at 7–9.

14 *Id.* at 7–9.

15 Jill Grant, *Mixed Use in Theory and Practice: Canadian Experience with Implementing a Planning Principle*, 68 J. AM. PLAN. ASS'N 71, at 71–72 (2002).

16 *Id.*

17 *Id.*

18 Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 396–97 (1926).

19 *Id.* at 388–390.

locations and likewise for commercial use areas of other kinds were permissible excercises of the police power.[20] The American suburbs grabbed this power and ran with it, using their wide latitude to turn farmland into havens of wide green yards and family values that have consistently won the battle with urban centers for the hearts and dollars of affluent residents.[21] Courts in the United States have consistently upheld the peculiarities of the suburb, which fly in the face of much older notions of the city as a self-contained, integrated, and social community.[22] The preference for the spread out urban lifestyle coupled with "the rise of the automobile as the dominant mode of transportation . . . [has] led to much more disbursed patterns of land use and development."[23] The effect of this early to late twentieth century urban planning is ongoing, "the dominant image and reality of housing in North American society is the low-rise, single-family residential subdivision. The image and reality of retail space is found in a large regional shopping center or strip retail space along major thoroughfares."[24]

2. *Theoretical Underpinnings*

The predominant principles of American suburbanization can be traced to Ebenezer Howard in his book, *Garden Cities of Tomorrow*, which advocated for a precise and absolute separation of space uses from one another, large housing developments with expansive green space, and minimalized street and commercial space that, in Howard's and a later thinker Sir Patrick Geddes' thinking, lent themselves to taking urban growth from a local problem to a regional expansion opportunity.[25] This approach has been criticized by advocates of more compact city development such as Jane Jacobs,[26] who advocated for

---

[20] *Id.*
[21] *See* Kenneth A. Stahl, *The Suburb as a Legal Concept: The Problem of Organization and the Fate of Municipalities in American Law*, 29 CARDOZO L. REV. 1193, 1195 (2008).
[22] *Id.* at 1196–1197.
[23] SCHWANKE ET AL., *supra* note 7, at 1.
[24] *Id.*
[25] JANE JACOBS, THE DEATH AND LIFE OF GREAT AMERICAN CITIES 17–23 (1961).
[26] Nathaniel Rich, *The Prophecies of Jane Jacobs,* ATLANTIC (Nov. 2016), https://www.theatlantic.com/magazine/archive/2016/11/the-prophecies-of-jane-jacobs/501104/ (describing the life and work of Jane Jacobs, the famous author, activist, and urban theorist).

dynamic urban centers.[27] Jacobs, an advocate of what would later be termed Compact City Theory, argues that healthy and vibrant urban environments that escape both economic depression that produces slum living and the aesthetic and social dullness of suburbs[28] require "a most intricate and close-grained diversity of uses that give each other constant mutual support, both economically and socially."[29] Mixed-use developments, with their closely integrated uses and coherent pedestrian-oriented planning create, at least in theory, reinforcing socioeconomic environments that enhance the well-being of workers, residents, and customers who interact with them.[30] This is in line with old notions of the city as a community, embracing "the forced social interaction of the city" and the "urban ethic of cooperation" which suburbs laid aside in favor of the "guarded seclusion of the single family home."[31] In a sense, mixed-use developments represent a return to the roots of communal life, which undoubtedly Jane Jacobs believed was essential to the health of the people, the cities, and the democratic institutions of this country.[32]

3. *American Mixed-Use Developments*

Mixed-use development is defined by the Urban Land Institute as a development "having three or more significant revenue-producing uses, [commercial, entertainment, retail, and residential], with significant physical and functional integration, (including uninterrupted pedestrian connections) and be developed in

---

[27] James E. Karas B.A., Resident Attitudes Toward Higher Residential Densities in Columbus, Ohio: Privatism Versus Public Advantage and the Acceptance of Urban Megastructures 22 (1983) (citing JACOBS, *supra* note 25) (unpublished M.C.R.P. thesis, The Ohio State University) (on file with the OhioLINK Electronic Theses & Dissertations Center), http://rave.ohiolink.edu/etdc/view?acc_num=osu1392816956.

[28] JACOBS, *supra* note 25, at 4–7.

[29] *Id*. at 14.

[30] *See generally* Russel Fraser James, B.A., Urban Mixed-Use Developments A Case Study: The Arena District, Columbus, Ohio (2002) (citing ANDY COUPLAND, RECLAIMING THE CITY: MIXED USE DEVELOPMENT 5 (Andy Copeland ed., 1997) (unpublished M.C.R.P. thesis, The Ohio State University) (on file with the OhioLINK Electronic Theses & Dissertations Center), http://rave.ohiolink.edu/etdc/view?acc_num=osu1392796212; SCHWANKE ET AL., *supra* note 7, at 46.

[31] Stahl, *supra* note 21, at 1196.

[32] Rich, *supra* note 26.

conformance with a coherent plan."[33] Mixed-use goes beyond multi-use, the three or more uses must be significant to qualify, meaning they support but are not merely incidental to the other uses, such as a shopkeeper's apartment above his shop would be.[34] Generally, this requires a sufficiently large scale for the mixed-use development to accommodate the legitimate function of each type of integrated development, and a requisitely significant public image to bring tenants and customers into the self-contained community.[35] Physical and functional integration can take many forms, but all are characterized by quick and convenient access by pedestrians to all parts of the development and its uses in a semi-contained space, for example: a tower with residences, commercial offices, and shopping spaces all accessible via elevator or an open courtyard connecting closely located apartments, hotels, and entertainment venues.[36] Prior to the true rise of mixed-use developments, the indoor shopping mall provided an integrated multi-store retail experience but the majority of these developments, even if they have adjacent divergent use areas, are too separated by massive parking lots to constitute a cohesive whole.[37] "Whatever their form 'coherent' plans for mixed use developments typically set forth at a minimum the types and scale of land uses, permitted densities, and general areas of the site where different kinds of development are to occur."[38]

The prototypical successful mixed-use development is Rockefeller Center in New York City, which features tightly clustered high-rise office and residential combination towers with extensive tenant serving retail, cultural spaces, and amenity facilities built into street facing spaces and grand plazas.[39]

In the 1960s, mixed-use developments were conceived as a means of addressing blighted downtowns by creating spaces that would keep people from moving to the suburbs by extending the cycle of active use in the city center.[40] The John Hancock Center, built in Chicago between 1965 and 1969, was the first example of a vertically integrated mixed-use development which featured residences, offices, retail, and other amenities, including parking, all self-contained in one

---

[33] James, *supra* note 30, at 3.
[34] SCHWANKE ET AL., *supra* note 7, at 3.
[35] *Id.* at 4.
[36] *Id.* at 4.
[37] *Id*. at 13–14.
[38] *Id.* at 5.
[39] *Id*. at 10.
[40] *Id.* at 18–19.

skyscraper.[41] The success of mixed-use as a draw factor to urban spaces led to massive expansion of the number and variety of mixed-use development styles in the 1970s.[42] The Houston Galleria successfully married the open air mall to hotel and office spaces, and the IDS Center in Minneapolis perfected the open atrium services space that The John Hancock Center lacked.[43] These developments produced a model for high rise multi-use developments to follow, this trend of internal facing spaces was a major distinguisher of multi-use development in the 1970s.[44]

The 1980s saw continued growth in the use of mixed-use development as a tool with an increasing diversity of projects in suburban communities and projects with smaller square footage using the form.[45] During the decade, entertainment uses became more popular additions to developments and integration of rehabilitated historical buildings became more common features of mixed-use projects.[46] During the 1990s and 2000s "[m]ixed-use developments emerged as manifestations of sustainable design, walkable urbanism and 'smart growth' initiatives."[47] As mixed-use development practices have evolved three forms have become archetypal: traditional neighborhood development, transit-oriented development,[48] both of which consist primarily of horizontally integrated uses,[49] and vertically integrated development.[50]

In a traditional neighborhood style development there is a fine-grain mixing of compatible uses such as stores with residential units built over top.[51] The objective of this style is to implement mixed uses to minimize congestion while preserving the feel of a village center where people live, work, and play in shared public spaces.[52] Alternatively, in transit-oriented development, a high-intensity and

---

[41] *Id*. at 28–29.
[42] *Id.* at 31–35.
[43] *Id.* at 31–35.
[44] *Id.*
[45] *Id*. at 43–44.
[46] *Id*. at 43–44.
[47] URBAN LAND INSTITUTE, MIXED-USE DEVELOPMENT 101: THE DESIGN OF MIXED-USE BUILDINGS (2011), http://triangle.uli.org/wp-content/uploads/sites/54/2013/01/Design-of-Mixed-Use-Buildings.pdf.
[48] Grant, *supra* note 15, at 73.
[49] *Id.*
[50] URBAN LAND INSTITUTE, *supra* note 47.
[51] Grant, *supra* note 15, at 73.
[52] *Traditional Neighborhood Development*, NAT'L LEAGUE OF CITIES (Mar. 7, 2017), https://www.nlc.org/resource/traditional-neighborhood-development.

density entertainment, commercial, residential district is centered around a transit hub with progressively less dense areas surrounding.[53] The objective of transit-oriented development is to establish a network of pedestrian and public transit routes that draw people into a shared commercial, entertainment, and residence space that is itself walkable and socially integrated.[54] The third form is integrated multi-story structures which feature vertically integrated uses in low, mid, or high-rise towers.[55] Due to the compactness inherent in building vertically rather than spreading a development out, these structures are better suited to the core of large metropolitan areas.

B. *Benefits of Mixed-use Developments*

In some locations which have limited traffic or are adjacent to economically blighted neighborhoods in a city, mixed-use developments can provide self-sustaining new development because of their synergistic nature, and may even serve as a kickstarter for the improvement of adjacent areas.[56] Mixed-use developments also have been used as effective bridges from existing Euclidean zone districts, from residential to office or residential to retail for example.[57] Shared infrastructure and give and take support among tenants, residents, and visitors of mixed-use development spaces can allow for support of amenities and public spaces that otherwise would not be supported by a single, or merely multi-use, development.[58] Mixed-use allows for the creation of a self-contained community where none may have existed before; one anecdotal example of this would be the Grandview Yard Development in Grandview Heights, Ohio which has created a self-contained community in previously vacant space adjacent to the urban core of Columbus, Ohio.[59]

---

[53] Grant, *supra* note 15, at 74.
[54] MEX. SUSTAINABLE TRANSP. CTR., TOD GUIDE FOR URBAN COMMUNITIES, https://www.nlc.org/sites/default/files/SCI%20Documents/TOD_Guide_Urban_Communities_English_EMBARQ.pdf.
[55] URBAN LAND INSTITUTE, *supra* note 47.
[56] SCHWANKE ET AL., *supra* note 7, at 45.
[57] *Id.* at 46.
[58] *Id*. at 45–46.
[59] *Grandview Yard*, NATIONWIDE REALTY INVS., https://nationwiderealtyinvestors.com/portfolio-item/grandview-yard/ (last visited Nov. 29, 2018); *Grandview Yard: Project History*, NATIONWIDE REALTY INVS., https://www.grandviewyard.com/about/project-history/ (last visited Nov. 8, 2018).

The self-sustaining nature of mixed-use development gives investors and developers more confidence when deciding to place a new project. A not inexpensive proposition in the increasingly popular urban core spaces that are drawing young people away from smaller municipalities.[60] "As land costs climbed, developers sought ways to build greater 'supportable values' through higher density and mixed-use development."[61] Mixed-use development allows for old office tower structures in city centers to be partially repurposed to accommodate residential demand, while also creating centers of social and economic activity for the city such as the Tower City development in Cleveland, which centers around Terminal Tower.[62]

Mixed-use developments have also been tools for increasing sustainability in urban life by concentrating uses within shared infrastructure which reduces both the impact of construction and the impact of travel to the structure, as the small, focused location creates a hub for public transit and minimized automotive dependence for residents of the mixed-use development itself.[63] Empirical study by urban planning scholars confirm the environmental and social benefits of mixed-use structures generally;

> By and large data revealed an overwhelming support of the effectiveness and the efficiency of the compact city in general and mixed-use characteristics in particular. In addition to compactness as evidence from this study suggest it must be re-emphasized that the role of the 'mixed-use factor is an essential and integrated part of any urban development towards achieving both environmental and social sustainability.[64]

---

[60] Beau Dure, *Millennials Continue Urbanization of America, Leaving Small Towns*, NAT'L PUB. RADIO (Oct. 21, 2014), https://www.npr.org/2014/10/21/357723069/millennials-continue-urbanization-of-america-leaving-small-towns.

[61] SCHWANKE ET AL., *supra* note 7, at 17.

[62] Michelle Jarboe, *Terminal Tower Sold to K&D Group in $38.5 Million Deal; Apartments Planned for 12 Floors,* CLEV. PLAIN DEALER (Sept. 15, 2016), http://realestate.cleveland.com/realestate-news/2016/09/terminal_tower_sold_to_kd_grou.html.

[63] URBAN LAND INSTITUTE, *supra* note 47, at 28–30.

[64] MOHAMMAD REZA MASNAVI, SUSTAINABLE URBAN FORMS PLANNING AND DESIGN STRATEGIES: THE COMPACT CITY, URBAN SPRAWL, AND MIXED USE DEVELOPMENT IN THEORY AND PRACTICE 274 (2011).

So, it would be reasonable to claim that mixed-use developments benefit communities by increasing socialization (a goal that would please Jane Jacobs),[65] convenience for residents, and return on investment for developers while minimizing costs and risks of development and overall environmental impact for new uses in urban settings.

C. *Problems with Mixed-use Developments*

The Not-in-My-Backyard effect (NIMBY) is a term used to describe the backlash that residents of a particular area might have to the addition of a new structure or use to their area of residence. Some mixed-use development plans face this effect when integrated into pre-existing communities because residents of the community object to the co-location of a new use to their living space.[66] The NIMBY effect has historically been a reaction both to new uses that appear facially incompatible with residential use, such as waste management, as well as innocuous additions to a community, such as a park.[67] The history of Euclidean zoning in the United States in many ways reflects the NIMBY attitude due in no small part to the fact that the Supreme Court relied on the common law doctrine of nuisance to justify the power of municipalities to engage in zoning when it decided *Village of Euclid v. Ambler Realty Company.*[68] Even newly planned communities have to be conscious about how many uses are mixed into their development because potential residents simply will not tolerate uses they view as incompatible with their quality of life.[69] As a result, industry is often relegated to outside of mixed-use spaces which can limit the work, live, and play in one place goal of mixed-use development.[70]

Mixed-use developments have also been criticized for being so self-contained that they become forbidding to outsiders, acting to isolate visitors from the surrounding city that these developments are supposed to support.[71] In seeking to create synergistic uses that sustain an internal community of the development, some designs such as the Renaissance Center in Detroit, Michigan, critics claim, have created

---

[65] *See generally* Rich, *supra* note 26.
[66] Grant, *supra* note 15, at 73.
[67] *Id*.
[68] *See* Stahl, *supra* note 21, at 1265 (citing Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387–388 (1926)).
[69] Grant, *supra* note 15, at 73.
[70] *Id*.
[71] SCHWANKE ET AL., *supra* note 7, at 45.

imposing fortress-like spaces that push visitors away.[72] Mixed-use developments have also been criticized as merely bringing suburban commercialism and regimentation into the urban setting making them both unappealing to visit and antithetical to the goals of a vibrant urban space.[73] Jane Jacobs advocated mixed-uses precisely because of the energy and life of the urban streetscape which promoted the social interaction she believed upheld democratic norms.[74] Mixed-use developments that become "sterile and sanitized environments devoid of the energy and vitality of the real city they try to imitate,"[75] as some have been criticized of, miss their intended purpose.

Further, successful mixed-use development requires extraordinarily careful planning and management to be successful, and high up front development costs of monumental facilities only serve to add additional risk to an already intensive development process.[76] While this may in some ways be offset by the ability of a developer to more quickly build out a compact structure or set of structures with shared infrastructure than possible in single-use development and the ability to select higher land value sites because of the density of mixed-use development, the planning challenges of mixed-use still leave little room for error.[77]

III. TAX CREDITS AS TOOLS OF DEVELOPMENT

A. *Tax Credits for Development, The American Model*

1. *Two Systems*

Speaking generally, political science scholars view the United States as lagging behind other industrialized democratic states, primarily in Europe, when it comes to providing for the basic welfare of citizens.[78] However, political scientists point to an American welfare state that some scholars have referred to as the "submerged,"

---

[72] *Id.* at 41.
[73] *Id.* at 46.
[74] *See* Rich, *supra* note 26.
[75] SCHWANKE ET AL., *supra* note 7, at 45.
[76] *Id.*
[77] *Id.*
[78] JAMES GREER & OSCAR GONZALEZ, COMMUNITY ECONOMIC DEVELOPMENT IN THE UNITED STATES: THE CDFI INDUSTRY AND AMERICA'S DISTRESSED COMMUNITIES 111 (2017) (ebook), http://rave.ohiolink.edu/ebooks/ebc/9781349698103.

in that it relies primarily on tax credits which remove money from government revenue to incentivize private expenditure on services rather than directing government expenditures in programs to achieve similar goals.[79] The European direct expenditure model has been attempted in the United States, such as under the Roosevelt Administration during the New Deal and the Johnson Administration during the War on Poverty, it has otherwise been disfavored due to the high visibility of these government programs and the relative political powerlessness of their beneficiaries which undermines their political support.[80] In contrast, tax credit benefits tend to be regressive and opaque, and, though functionally equivalent to government expenditures for social welfare, the increased political power of wealthy beneficiaries of tax credits and limited public understanding of the tax code make tax credits an attractive policy choice for American political leaders.[81] The basic political philosophy of tax credit-driven development is premised upon devolution to local control, activation of the private sector corporations and non-profits as drivers of development, reduction in total cost to government by leveraging market competition, and using the low-saliency of tax credits to avoid public pressure to spend more.[82]

2. *Why Incentivize Development?*

Government entitites have both economic and social interests that are served by incentivizing particular kinds of real estate development within their jurisdiction.[83] Property values, employement, and retail sales activity are all sources of government revenue.[84] Real estate developers achieve their business objectives when their project creates value, from tenant rents – which means valuable property, with credit worthy tenants producing enough revenues to fulfill rent obligations.[85] Government incentives can therefore be opportunities for developers and government actors to align themselves around shared economic goals; developers want to maximize net operating income of their project and governements want to maximize revenue from taxes on the

[79] *Id.* at 112.
[80] *See id.* at 112–114.
[81] *See id.* at 114.
[82] *See id.* at 117–120.
[83] RICK DALEY, REAL ESTATE DEVELOPMENT LAW 174 (2nd ed. 2011).
[84] *Id.* at 174–175.
[85] *See id.* at 42–43.

property and its occupants.[86] Also, beyond the revenue interests, governments can act to incentivize particular kinds of development with broader social impacts including sustainability, revitalization, or social equity.[87] The government unit offering an incentive is making a bet that the incentivized development will produce more long-term revenue and social good than the generally short-term costs of the incentive.[88] Government actors maximize the value of their investment when the project would not have been developed "but for" the government incentive.[89] If the developer would have gone forward regardless of the incentive, or not been stopped by the lack of incentive, then a government actor has expended its limited funds to pad the developers profit and not to win the good of development.[90] However, considering the mixed-use development of the size and scope that H.B. 469 would incentivize,[91] the feasiability challenges are not insignificant.[92]

3. *Contextual Development Tax Credits for Ohio H.B. 469*

At the time of writing only one state, Pennsylvania, has enacted a tax credit for the support of mixed-use development.[93] The field of comparable credits against which to compare Ohio H.B. 469's transformation mixed-use development (TMUD) credit program is therefore very sparse. However, it is possible to place it in the context of certain other credits with similar policy goals.

Proponents of the TMUD tax credit cite to the ability of these developments to catalyze economic growth in the areas around them and draw in new residents and employers.[94] The tax credit is also a credit to support the development of real estate projects which meet

---

[86] *Id.* at 173–175.
[87] *See id.* at 175.
[88] *Id.* at 196–197.
[89] *See generally id.* at 201–202.
[90] *See generally id.*
[91] *See* Sub. H.B. 469, 132nd Gen. Assemb., Reg. Sess. (Ohio 2018) (as passed by the House).
[92] *See generally* SCHWANKE ET AL., *supra* note 7, at 123.
[93] 72 PA. CONS. STAT. § 8907-E (LEXIS through 2018 Reg. Sess. Acts 1-87, 89-94, 97, 105, 107, 108, 111, 115, 124, 128, 131, 132, 145, 156, 158, 161, 163, 164).
[94] *Hearing on H.B. 469 Before the H. Comm. on Gov't Accountability and Oversight*, 132nd Gen. Assemb., Reg. Sess. (Ohio Feb. 27, 2018), (proponent testimony of Kent Scarrett, Exec. Director, Ohio Municipal League), https://www.legislature.ohio.gov/legislation/legislation-committee-documents?id=GA132-HB-469.

certain criteria.[95] In 1976 the federal Historic Preservation Tax Credit was enacted[96] and in 2000 the federal New Markets Tax Credit was enacted.[97] These credits incentivize the preservation and rehabilitation of historical structures[98] and investment in low-income communities to drive economic vitality respectively.[99] These federal efforts have been, as is demonstrated later, adopted by several states as models for credits against state taxes.

As a result of the limited comparable state tax credit programs against which to compare Ohio H.B. 469, a review of the legislation in the context of credits that pursue similar aims would seem to be an appropriate methodology to frame a critical analysis of the proposed tax credit program. To that end, what follows is a review of the Historic Preservation Tax Credits and New Markets Tax Credits of the several states that have enacted such programs and a comparison of Ohio's proposed credit program to this set of data.

B. *Historical Preservation Tax Credits*

1. *The Federal Historic Preservation Tax Credit*

The Federal Historic Preservation Tax Credit is a credit against the federal tax liability that reimburses a taxpayer for 20% of the expenses of rehabilitation a structure identified by the National Park Service as a certified historic structure.[100] Costs involved in construction, accounting, architectural drafting, and engineering of a historic rehabilitation are covered by the credit, though these qualified rehabilitation expenditures are only eligible for the credit if they exceed $5000 or the value of the structure itself.[101] This tax incentive has been shown to create a desire in large corporate entities to invest in rehabilitation rather than new facilities because of strategic

---

[95] *See* H.B. 469, 132nd Gen. Assemb., Reg. Sess. (Ohio 2018) (as introduced).
[96] *Federal Rehabilitation Tax Credit (Historic Tax Credit)*, NAT'L CONF. STATE HIST. PRESERVATION OFFICERS http://ncshpo.org/issues/historic-tax-credit/ (last visited Jan. 15, 2019).
[97] *What is The New Markets Tax Credit, and How Does it Work?*, TAX POL'Y CTR., https://www.taxpolicycenter.org/briefing-book/what-new-markets-tax-credit-and-how-does-it-work (last visited Jan. 15, 2019).
[98] *Federal Rehabilitation Tax Credit*, *supra* note 96.
[99] *What is The New Markets Tax Credit*, *supra* note 97.
[100] NAT'L PARK SERV., HISTORIC PRESERVATION TAX INCENTIVES 4, https://www.nps.gov/tps/tax-incentives/taxdocs/about-tax-incentives-2012.pdf .
[101] *Id.* at 9.

advantages derived from location of historical structures vis-à-vis land for new facilities and corporate good will in local communities.[102] Over the course of the program's history, it has catalyzed nearly $90 billion in investments to preserve more than 40,000 structures.[103]

2. *State Historic Preservation Tax Credits*

State	Percentage of Rehabilitation Cost Covered – Income Producing Property Only	Taxes to Which Credit May be Applied	Transfer, Refund, and Carry Forward of Credits
Alabama	25% of rehabilitation cost creditable up to $5 million for a single project and no more than $20 million in credits statewide in any tax year[104]	Income Taxes[105]	Transferable, Refundable,[106] no carry forward[107]

[102] *Tax Incentives for Preserving Historic Properties*, NAT'L PARK SERV., https://www.nps.gov/tps/tax-incentives.htm (last visited Jan. 15, 2019).
[103] *Id.*.
[104] *Id.*
[105] ALA. CODE § 40-9F-33 (LEXIS through Acts 2019, No.19-12).
[106] NAT'L TRUST FOR HIST. PRESERVATION, STATE HISTORIC TAX CREDITS: MAXIMIZING PRESERVATION, COMMUNITY REVITALIZATION, AND ECONOMIC IMPACT 30 (2018), https://www.novoco.com/sites/default/files/atoms/files/nthp_state_htcs_maximizing_preservation_report_120418.pdf.
[107] *Id.* at 12.

Arkansas	25% of rehabilitation cost creditable up to $400,000 for a single project and no more than $4 million in credits statewide in any tax year[108]	Income Taxes, Insurance Premium Taxes[109]	Transferable, non-refundable,[110] 5-year carry forward[111]
Colorado	25% of cost creditable on the first $2 million in Qualified Rehabilitation Expenses (QRE) and 20% for any more QRE Up to $1 million for a single project and no more than $10 million in credits statewide in any tax year.[112]	Income Taxes[113]	Transferable, non-refundable,[114] 10-year carry forward[115]

[108] *Id.* at 30.
[109] ARK. CODE ANN. §26-51-2205 (LEXIS, unofficially updated with laws effective through Act 620 of the 2019 Reg. Sess. (except Acts 288, 315, 377-394, 545, 552, 577 sec. 4, and 597), and also including Acts 624, 633, and other laws effective through April 3, 2019 of the 2019 Reg. Sess.).
[110] NATIONAL TRUST, *supra* note 105, at 30.
[111] ARK. CODE ANN. §26-51-2205.
[112] NATIONAL TRUST, *supra* note 105, at 30.
[113] COLO. REV. STAT. § 39-22-514.5 (LEXIS through all Laws passed during the 2018 legis. Sess. and Ballot Measures approved in the November 2018 General Election).
[114] NATIONAL TRUST, *supra* note 105, at 30.
[115] COLO. REV. STAT. § 39-22-514.5.

Connecticut	25% of rehabilitation cost creditable up to $4 million for a single project and no more than $31.7 million in credits statewide in any tax year[116]	Insurance Premium Tax, Health Care Center Subscription Tax, Business Franchise Tax, taxes on companies classified as air carriers, railroads, telecommunications, satellite transmission, dry cleaners, hospitals, home health care, and utilities[117]	Transferable, non-refundable,[118] 5-year carry forward[119]
Delaware	20% of rehabilitation cost with no more than $5 million in credits statewide in any tax year[120]	Income Taxes, Business Franchise Tax[121]	Transferable, non-refundable,[122] 10-year carry forward[123]

[116] *Id.*
[117] CONN. GEN. STAT. § 10-416c (LEXIS through the 2018 First Reg. Sess.).
[118] NATIONAL TRUST, *supra* note 105, at 30.
[119] *Id.* at 12.
[120] *Id.* at 30.
[121] DEL. CODE ANN tit. 30, § 1813 (LEXIS through 82 Del. Laws, ch. 7).
[122] NATIONAL TRUST, *supra* note 105, at 30.
[123] DEL. CODE ANN tit. 30, § 1813.

Georgia	25% of rehabilitation cost creditable up to $5 million for a single project, up to $10 million if job creation criteria met. Limit on statewide tax credits to $300,000 for every $25 million in investment statewide annually.[124]	Income Taxes[125]	Transferable, non-refundable,[126] 10-year carry forward[127]
Illinois[128]	25% of rehabilitation cost creditable up to $3 million for a single project and no more than $15 million in credits statewide in any tax year[129]	Income Taxes[130]	Non-transferrable, non-refundable,[131] 10-year carry forward[132]

[124] NATIONAL TRUST, *supra* note 105, at 30.
[125] GA. CODE ANN. § 48-7-29.8 (LEXIS through the 2018 Extra Sess. of the Gen. Assemb.).
[126] NATIONAL TRUST, *supra* note 105, at 30.
[127] GA. CODE ANN. § 48-7-29.8.
[128] (Statewide Tax Credit only, not Rivers Edge HRTC)
[129] NATIONAL TRUST, *supra* note 105, at 30.
[130] 35 ILL. COMP. STAT. 5/219 (LEXIS through through P.A. 101-2 of the 2019 Reg. Sess. of the 101st General Assemb.).
[131] *Id.*
[132] 35 ILL. COMP. STAT. 30/15 (LEXIS through P.A. 101-2 of the 2019 Reg. Sess. Of the 101st General Assemb.).

Iowa	25% of rehabilitation cost with no more than $45 million in credits statewide in any tax year[133]	Personal Net Income Tax, Business Income Tax, Financial Institutions Franchise Tax, Insurance Premiums Tax[134]	Transferable, refundable,[135] 5-year carry forward[136]
Kansas	25% of rehabilitation cost with no limits as to individual credits or statewide aggregates[137]	Income Tax, State Insurance Premiums Tax, Business Franchise Tax[138]	Non-transferrable, non-refundable,[139] 10-year carry forward[140]
Kentucky	20% of rehabilitation cost creditable up to $400,000 for a single project and no more than $5 million in credits statewide in any tax year[141]	Personal Income Tax, Corporation Income Tax, Limited Liability Entity Tax[142]	Transferable, refundable,[143] No carry forward[144]

[133] NATIONAL TRUST, *supra* note 105, at 30.
[134] IOWA CODE § 404A.2 (LEXIS current through legis. From the 2018 Reg. Sess. Of the 87th General Assemb. and H.F. 288, H.F. 307, S.F. 367 and S.F. 519 of the 88th General Assemb.).
[135] NATIONAL TRUST, *supra* note 105, at 30.
[136] IOWA CODE § 404A.2.
[137] NATIONAL TRUST, *supra* note 105, at 30.
[138] KAN. STAT. ANN. § 79-32,211 (LEXIS through S.B. 9 and H.B. 2044).
[139] NATIONAL TRUST, *supra* note 105, at 30.
[140] KAN. STAT. ANN. § 79-32, 211.
[141] NATIONAL TRUST*,* *supra* note 105, at 31.
[142] KY. REV. STAT. ANN. § 171.397 (LEXIS through emergency legis. through Acts 2019 Chapter 32).
[143] NATIONAL TRUST*,* *supra* note 105, at 31.
[144] *Id.* at 12.

Louisiana	20% of rehabilitation cost creditable up to $5 million for a single taxpayer annually[145]	Income Taxes, Corporation Franchise Tax[146]	Transferable, non-refundable,[147] 5-year carry forward[148]
Maine	25% of rehabilitation cost creditable up to $5 million per building annually[149]	State Income Taxes, State Financial Institutions Franchise Tax[150]	Non-transferable, refundable,[151] no carry forward[152]

[145] *Id.* at 31.
[146] LA. STAT. ANN. § 47:6019 (LEXIS through all 2018 legis.).
[147] NATIONAL TRUST, *supra* note 105, at 31.
[148] LA. STAT. ANN. § 47:6019.
[149] NATIONAL TRUST, *supra* note 105, at 31.
[150] ME. REV. STAT. ANN. tit. 36, §§ 5101–5403, 5219-BB, 5219-HH (LEXIS through Chapter twenty-six of the First Reg. Sess. of the 129th Me. Leg. Sess.).
[151] NATIONAL TRUST, *supra* note 105, at 31.
[152] *Id.* at 12.

Maryland	20% of rehabilitation cost creditable up to $3 million for a single project and no more than $9 million in credits statewide in any tax year.[153] An additional 5% credit available for projects which are a sustainable building. or which qualify as a low-income housing development[154]	All state taxes[155]	Non-transferable, refundable,[156] no carry forward[157]
Minnesota	20% of rehabilitation cost with no limits as to individual credits or statewide aggregates[158]	Income Taxes, Corporation Franchise Tax[159]	Transferable, refundable,[160] and no carry forward[161]

153 *Id.* at 31.
154 MD. CODE ANN., STATE FIN. AND PROC. § 5A-303.
155 MD. CODE ANN., STATE FIN. AND PROC. § 5A-303 (LEXIS through Chapters 1, 2, 7, 8, 13 and 15 of the 2019 Reg. Sess. of the General Assemb.).
156 NATIONAL TRUST, *supra* note 105, at 31.
157 NATIONAL TRUST, *supra* note 105, at 12.
158 *Id.* at 31.
159 MINN. STAT. § 290.0681 (LEXIS through Chapter 8 of the 2019 Reg. Sess. of the Minn. 91st Leg.).
160 NATIONAL TRUST, *supra* note 105, at 31.
161 *Id.* at 12.

Michigan[162]	25% of rehabilitation cost with no limits on individual or statewide credits.[163] The Michigan HRTC program stopped certifying new projects for credit in 2012, but due to carryforward credits may still be applicable until the 2022 tax year[164]	Insurance Premium Tax, Financial Institutions Franchise Tax, Sales Tax, Corporate Income Tax[165]	Transferable (if attached to sale of the rehabilitated property), refundable (up to 90% of the amount of the credit exceeds taxpayer liability if the credit amount was less than $250,000), 10-year carry forward period[166]
Mississippi	25% of rehabilitation cost creditable with no more than $12 million in credits statewide in any tax year[167]	Income Taxes[168]	Non-transferrable, 75% refundable,[169] 10-year carry forward.[170]

[162] Nick Metrowsky, *We Don't Give a Damn for the Whole State of Michigan,* SONGS OF THE OHIO STATE UNIVERSITY, http://www.scarletandgray.info/osu/songs/michigan.html (A state for which it should be noted, as a Buckeye, the Author does not give a damn).
[163] MICH. COMP. LAWS § 206.266 (LEXIS through Pub. Act 2 from the 2019 legis. Sess.); Income Act of 1967, MICH COMP. LAWS §§ 206.1 – 206.532.
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] NATIONAL TRUST*,* *supra* note 105, at 31.
[168] MISS. CODE ANN. §27-7-22.31 (LEXIS through laws approved by the Governor through March 26, 2019, not including changes and corrections made by the J. Legis. Comm. on Compilation, Revision and Publication of Legis.).
[169] NATIONAL TRUST, *supra* note 105, at 31.
[170] MISS. CODE ANN. §27-7-22.31.

Missouri	25% of rehabilitation cost creditable with a limit of than $90 million in credits statewide in any tax year Additional $30 million in credits beyond the limit for projects in designated high poverty zones,[171] and no limit on credits for projects with less than $275,000 in earned tax credits[172]	Personal Income Tax, Corporate Income Tax, Financial Institutions Franchise and Income Taxes, and Insurance Premiums Tax[173]	Transferable, non-refundable,[174] 3-year carry forward[175]
Montana	5% of rehabilitation cost with no limits as to individual credits or statewide aggregates[176]	Corporate Income Tax, Corporate Minimum Tax, Alternative Gross Sales Tax[177]	Non-transferable, non-refundable,[178] 7-year carry forward[179]

[171] NATIONAL TRUST, *supra* note 105, at 31.
[172] MO. REV. STAT. § 253.559 (LEXIS through 2018 legis.).
[173] MO. REV. STAT. § 253.550 (LEXIS through 2018 legis.).
[174] NATIONAL TRUST, *supra* note 105, at 31.
[175] *Id.* at 12.
[176] *Id.* at 31.
[177] MONT. CODE ANN. § 15-31-151 (LEXIS through chapters effective, February 28, 2019, of the 2019 reg. sess., 66th Leg.).
[178] NATIONAL TRUST, *supra* note 105, at 31.
[179] MONT. CODE ANN. § 15-31-151.

Nebraska	20% of rehabilitation cost creditable up to $1 million for a single project and no more than $15 million in credits statewide in any tax year[180]	Income Taxes, Insurance Premium Tax, Financial Institutions Franchise Tax[181]	Non-transferable, non-refundable,[182] unlimited carry forward[183]
New Mexico	50% of rehabilitation cost creditable up to $25,000 for a single project and $50,000 if the project is located within an Arts & Culture District[184]	Corporate Income Tax[185]	Non-transferable, non-refundable, [186] 4-year carry forward[187]

180 NATIONAL TRUST, *supra* note 105, at 31.
181 NEB. REV. STAT. § 77-2904 (LEXIS through the 2019 reg. sess. of the 106th Leg. First Sess. acts). Nebraska appears to be the only state in the union that can't be bothered to use the term "Historic Rehabilitation" in its statutory language for this type of tax credit, the state's act is rather for "Mainstreet Revitalization" which is very unhelpful if you were trying to find the statute, but as they say, if you can't say something nice say it in a footnote.
182 NATIONAL TRUST, *supra* note 105, at 31.
183 *Id.* at 12.
184 *Id.* at 31.
185 N.M. STAT. ANN. § 7-2A-8.6 (LEXIS through Chapter 43 of the 54th Leg.'s 2019 Reg. Sess.).
186 NATIONAL TRUST, *supra* note 105, at 31.
187 *Id.* at 12.

New York	20% of rehabilitation cost creditable up to $5 million for a single project[188]	Personal Income Tax[189]	Non-transferable, refundable,[190] unlimited carry forward[191]
North Carolina	15% of rehabilitation cost creditable on the first $10 million in QRE and 10% for any QRE beyond $10 million and up to $20 million with an additional 5% in each grouping for projects in an area target by the state for development. Limited to $4.5 million for a single project[192]	Corporation Franchise Tax, Income Taxes, Insurance Premium Tax[193]	Non-transferable, non-refundable,[194] 9-year carry forward[195]

[188] *Id.* at 31.
[189] N.Y. TAX LAW § 606 (LEXIS through 2019 released Chapters 1-23).
[190] NATIONAL TRUST, *supra* note 105, at 31.
[191] *Id.* at 12.
[192] *Id.* at 31.
[193] N.C. GEN. STAT. § 105-129.108 (LEXIS through Sess. Laws 2018-145 of the 2018 Reg. Sess. and the 1st, 2nd, and 3rd Extraordinary Sess. of the General Assemb., but not including corrections and changes made to Sess. Laws 2018-132 through 2018-145 by the Revisor of Statutes, and Sess. Laws 2019-1 of the 2019 Reg. Sess. of the General Assemb.).
[194] NATIONAL TRUST, *supra* note 105, at 31.
[195] N.C. GEN. STAT. § 105-129.108.

North Dakota	25% of rehabilitation cost creditable for projects in a state identified Renaissance Zone up to $250,000 for a single project[196]	Personal Income Tax, Corporate Income Tax[197]	Non-transferable, non-refundable,[198] 5-year carry forward[199]
Oklahoma	20% of rehabilitation cost with no limits as to individual credits or statewide aggregates[200]	Personal Income Tax, Financial Institutions Franchise Tax[201]	Non-transferable, non-refundable, [202] 10-year carry forward[203]

[196] *Id.*

[197] N.D. CENT. CODE § 40-63-06 (LEXIS through all acts approved by the governor through Mar. 27, 2019 from 2019 Reg. Legis. Sess. with gaps of H.B. 1028, H.B. 1048, H.B. 1066, H.B. 1072, H.B. 1073, H.B. 1102, H.B. 1117, H.B. 1132, H.B. 1134, H.B. 1135, H.B. 1137, H.B. 1142, H.B. 1143, H.B. 1164, H.B. 1185, H.B. 1188, H.B. 1193, H.B. 1204, H.B. 1223, H.B. 1240, H.B. 1263, H.B. 1378, H.B. 1425, H.B. 1433, H.B. 1478, S.B. 2045, S.B. 2052, S.B. 2105, S.B. 2145, S.B. 2164, S.B. 2187, S.B. 2192, S.B. 2218, S.B. 2253, S.B. 2255, S.B. 2262, S.B. 2267, S.B. 2295, S.B. 2338, S.B. 2350 and S.B. 2360. The code does not include changes and corrections made by the N.D. Code Revisor).

[198] NATIONAL TRUST, *supra* note 105, at 31.

[199] N.D. CENT. CODE § 40-63-06.

[200] NATIONAL TRUST, *supra* note 105, at 31.

[201] OKLA. STAT. tit. 68, § 2357.41 (LEXIS through the 57th Leg. Act chapter 42, with the exception of chapter 11).

[202] NATIONAL TRUST, *supra* note 105, at 31.

[203] OKLA. STAT. tit. 68, § 2357.41.

Pennsylvania	25% of rehabilitation cost creditable up to $500,000 for a single project and no more than $3 million in credits statewide in any tax year[204]	Personal and Corporate Net Income Tax, Business Entity Franchise Tax, Bank, Trust, and Title Insurance Company Shares Tax, Insurance Premiums Tax, Gross Receipts Tax, Mutual Thrift Institutions Tax[205]	Transferable, non-refundable,[206] Unlimited carry forward for initial credit holders but no carry forward for transferees[207]

[204] NATIONAL TRUST, *supra* note 105, at 32.
[205] 72 PA. STAT. § 8702-H (LEXIS through 2019 Reg. Sess. Act 1).
[206] NATIONAL TRUST, *supra* note 105, at 32.
[207] 72 PA. STAT. § 8705-H (LEXIS through 2019 Reg. Sess. Act 1).

Rhode Island	22% (after state levied service fees which adjust based upon the negotiated tax credit rate of between 25% and 27% to equalize the actual credit value)[208] of rehabilitation cost creditable limited to $5 million in credits statewide in any given tax year[209]	Corporate Income Tax, Political Organization Tax, Public Service Corporation Tax, Railroad Corporation Tax, Domestic Bank Franchise Tax, National Bank Income Tax, Insurance Premiums Tax, Personal Income Tax[210]	Transferable, refundable for non-profit entities, non-refundable for all other taxpayers,[211] 10-year carry forward[212]
Texas	25% of rehabilitation cost with no limits as to individual credits or statewide aggregates[213]	Business Franchise Tax[214]	Transferrable, non-refundable,[215] 5-year carry forward[216]

---

208 44 R.I. GEN. LAWS § 44-33.2-3 (LEXIS through Chapter 12 of the Jan. 2019 Sess. but not including all corrections and changes made by the Director of Law Revision).
209 NATIONAL TRUST, *supra* note 105, at 32.
210 44 R.I. GEN LAWS § 44-33.2-3.
211 NATIONAL TRUST, *supra* note 105, at 32.
212 44 R.I. GEN LAWS § 44-33.2-3.
213 NATIONAL TRUST, *supra* note 105, at 32.
214 TEX. TAX CODE ANN. § 171.902 (LEXIS current through the 2017 Reg. Sess. and 1st C.S., 85th Leg.).
215 NATIONAL TRUST, *supra* note 105, at 32.
216 TEX. TAX CODE ANN. § 171.906.

Vermont	10% of rehabilitation cost for standard historic rehabilitation projects, 25% of rehabilitation cost for projects which improve the façade of a building, and 50% of rehabilitation cost for projects which involve bringing a building in line with regulatory requirements or building codes with specific maximum credit limits between $12,000 and $50,000 for specific types of code improvements.[217] Limited to $2.4 million in statewide tax credits in a particular tax year.[218]	Individual Income Tax, Corporate Income Tax, Bank Franchise Tax, Insurance Premiums Tax[219]	Transferrable, non-refundable,[220] 9 year carry forward[221]

[217] VT. STAT. ANN. tit. 32, § 5930cc (LEXIS through the end of the 2017 adjourned sess. (2018) and the first spec. sess. (2018)).
[218] NATIONAL TRUST, *supra* note 105, at 32.
[219] VT. STAT. ANN. tit. 32, § 5930cc.
[220] NATIONAL TRUST, *supra* note 105, at 32.
[221] VT. STAT. ANN. tit. 32, § 5930dd (LEXIS through the end of the 2017 adjourned sess. (2018) and the first spec. sess. (2018)).

West Virginia	25% of rehabilitation cost creditable up to $10 million for a single project and no more than $30 million in credits statewide in any tax year[222]	Corporate Net Income Tax[223]	Transferable, non-refundable, [224] 10 year carry forward [225]
Virginia	25% of rehabilitation cost creditable with no more than $5 million in credits statewide in any tax year until 2020 at which point the tax credits in aggregate become unlimited[226]	Personal Income Tax, Corporate Income Tax, Financial Institution Franchise Tax, Insurance Franchise Tax, Utility Company Franchise Tax[227]	Non-transferrable, non-refundable, [228] Ten year carry forward[229]

[222] *Id.* at 32.
[223] W. VA. CODE § 11-24-23a (LEXIS through all 2019 legis. Effective as of Jan. 30, 2019).
[224] NATIONAL TRUST, s*upra* note 105, at 32.
[225] *Id.* at 12.
[226] *Id.* at 32.
[227] VA. CODE ANN. § 58.1-339.2 (LEXIS through the 2018 Spec. Sess. I of the General Assemb. and Acts 2019, cc. 11, 17, 18, 49, 100, 164, 225 and 282).
[228] NATIONAL TRUST, *supra* note 105, at 32.
[229] VA. CODE ANN. § 58.1-339.2.

Wisconsin	20% of rehabilitation cost creditable up to $3.5 million for a single project[230]	Personal Income Tax, Alternative Minimum Tax, Corporate Income Tax, Corporate Franchise Tax, Insurance Company Income Tax, Insurance Franchise Tax[231]	Transferable, non-refundable, [232] no carry forward[233]

3. *Ohio's Historic Preservation Tax Credit*

The Ohio Historic Preservation Tax Credit (OHPTC) is a competitive tax credit created to incentivize developers to invest in the maintenance and rehabilitation of historically significant structures.[234] "A building is eligible if it is individually listed on the National Register of Historic Places; contributes to a National Register Historic District, National Park Service Certified Historic District, or Certified Local Government historic district; or is listed as a local landmark by a Certified Local Government."[235] The owners or long-term rental occupants of qualified buildings can apply for credit to support a rehabilitation project though residential properties of all kinds, but single-family and multi-family are not eligible for the credit.[236] The State of Ohio has allocated $60 million per tax year for the OHPTC and limits tax credits to individual projects to $5 million in a given tax year, though certain projects identified by the Director of Development Services as "catalytic projects" are eligible for up to twenty-five million in credit.[237] A catalytic project is defined as having a positive economic impact on the area surrounding in the project area, and the

[230] WIS. STAT. §238.17 (2018).
[231] *Id.*
[232] NATIONAL TRUST, *supra* note 105, at 32.
[233] *Id.* at 12.
[234] *Ohio Historic Preservation Tax Credit Program*, OHIO DEV. SERVS. AGENCY, https://development.ohio.gov/cs/cs_ohptc.htm (last visited Jan. 12, 2019).
[235] *Id.*
[236] *Id.*
[237] OHIO REV. CODE ANN. § 149.311 (LEXIS through legis. Passed by the 133rd General Assemb. and filed with the Secretary of State through file 1 (H.B. 86)).

director is limited to identifying one such project in any given biennial state budgetary cycle.[238] The tax credit may be claimed by dealers in intangibles (securities and mortgages) against the state tax on shares and capital investment in such dealers,[239] domestic insurance companies[240] and foreign insurance companies[241] against their respective insurance premium taxes, corporations against the state's corporation franchise tax,[242] and by individual taxpayers against the state's personal income tax.[243] The credit is valued at 25% of the rehabilitation expenditures certified for the project.[244] For projects with a timeline of two years or less, credits are issued upon completion of the project when the rehabilitated structure is put into service. For projects of more significant size, credits may be issued after phases identified by the owner or qualified lessee of no longer than two years over the course of the project which may not exceed five years for completion.[245] The credit is refundable up to $3 million in a given tax year but may also be carried forward for a period of five years.[246] After approval of the rehabilitation project, but prior to completion and issuance of the credit certificate, the credits may be transferred to a new owner or lessor of the building being rehabilitated through purchase of the building, however, once the credits are issued they are not transferrable.[247] One recent example of how this tax credit has been put to use is a proposal by City Club Apartments LLC to renovate the largely vacant thirty-one story Fourth and Vine Tower in Cincinnati transitioning it from office to mixed-use with both residential apartments and retail space. City Club has made it clear that the $5

---

[238] *Id.*

[239] OHIO REV. CODE ANN. § 5725.151 (LEXIS through legis. Passed by the 133rd General Assemb. and filed with the Secretary of State through file 1 (H.B. 86)).

[240] OHIO REV. CODE ANN. § 5725.34 (LEXIS through legis. Passed by the 133rd General Assemb. and filed with the Secretary of State through file 1 (H.B. 86)).

[241] OHIO REV. CODE ANN. § 5729.17 (LEXIS through legis. passed by the 133rd General Assemb. and filed with the Secretary of State through file 1 (H.B. 86)).

[242] OHIO REV. CODE ANN. § 5733.47 (LEXIS through legis. passed by the 133rd General Assemb. and filed with the Secretary of State through file 1 (H.B. 86)).

[243] OHIO REV. CODE ANN. § 5747.76 (LEXIS through legis. passed by the 133rd General Assemb. and filed with the Secretary of State through file 1 (H.B. 86)).

[244] OHIO REV. CODE ANN. § 149.311 (LEXIS through legis. passed by the 133rd General Assemb. and filed with the Secretary of State through file 1 (H.B. 86)).

[245] *Id.*

[246] OHIO REV. CODE ANN. § 149.311.

[247] *Ohio Historic Preservation Tax Credit Program: Frequently Asked Questions*, OHIO DEV. SERVS. AGENCY, https://development.ohio.gov/files/redev/OHPTC%20Round%2019%20FAQ's%20revision%208-17.pdf (last visited Jan. 13, 2019).

million tax credit is critical to the project which will cost $103 million upon completion.[248]

4. *A Big Picture of State Historic Rehabilitation Tax Credits*[249]

i. *Credit Value*

Reviewing the data presented above about the several states that offer a historic rehabilitation tax credit allows one to roughly capture the norms for this style of credit as implemented by the several states. There is some difficulty in taking measures of central tendency on the data because not every state has enacted limits on credit value per project or on statewide distribution of credits in a given tax year, so representations of the data offer a less than complete reflection. All states with a historic rehabilitation tax credit of course have a fixed percentage of qualified rehabilitation expenses that can be credited against state taxes. Within that data set, the median and mode values are both 25% while the mean credit value is just shy of 23% (22.87%). Seventeen states offer the 25% rate, while the lowest rate is offered by Montana at 5%[250] and the highest rate is offered by New Mexico at 50%.[251] Amongst states which place some upper limit on total credits available in a given tax year, the median limit is $11 million, the modal limit is $5 million, and the mean limit is just over $20 million ($20.39 million). Eighteen states have enacted such annual limits, with the highest value at $90 million annually available in Missouri[252] and the lowest at $2.4 million annually in Vermont.[253] Eleven states have no limitation on the amount of tax credits which may be awarded. Amongst the nineteen states with enacted per project limits, the mean limit is just over $3 million ($3.24 million), the median value is $3.5

---

[248] Randy Tucker, *Landmark Downtown Building Eyed for $103 Mixed-Use Development,* CIN. ENQUIRER (Oct. 19, 2018), https://www.cincinnati.com/story/money/2018/10/19/landmark-downtown-building-eyed-103-m-mixed-use-development/1694241002/

[249] Data contained and analyzed in this section will be pulled from the above chart of State Historic Rehabilitation Tax Credits and the paragraph discussing Ohio's tax credit, *supra* Part III.B.3.

[250] NATIONAL TRUST, *supra* note 105, at 31.

[251] *Id.* This is a bit of a misnomer however, because New Mexico's credit is so limited that fifty percent in context still pales in comparison to what most other states offer.

[252] *Id.*

[253] *Id.* at 32.

million, but the modal value was $5 million per project. These limits vary a little in terms of their specific application because some states, such as Maine, structure the limit on a per building basis[254] while the majority have identified a per project limit. The highest per project limit within the data set belongs to West Virginia at $10 million,[255] higher than the annual statewide limits of eight other states, and the lowest per project limit comes from New Mexico at $25,000.[256] Thirteen states have no limit on per project credit value. In terms of credit value, the centermost state credit would be the credit offered by the State of Alabama, a 25% credit limited to $5 million per project and $20 million in statewide credits in a given tax year.[257]

ii. *Credit Usability*

Turning to use of the state historic rehabilitation tax credits, eighteen states allow their credits to be transferred in some way from the applicant taxpayer to another taxpayer, and fourteen states do not allow credit to be transferred. Only ten states allow complete or partial refund of the tax credit which exceeds tax liability for the credit holder in a given tax year while twenty-two states do not. The most common arrangement of transferability and refundability is a transferrable but non-refundable credit which is the structure utilized by thirteen states. The least common arrangement is a transferrable and refundable tax credit which is offered by only four states. Looking to the ability of credit holders to apply their credit to future tax liabilities, the mean carry-forward period is just over six years (6.1 years) with a median value of five years, and a modal value of ten years of carry forward. Six states allow no carryforward at all (all of these states allow some transfer or refund of the credit value) while three states allow unlimited carryforward (Nebraska offers this with no transfer or refundability for its credit).[258] The common combination of transferability, refundability, and carry forward is a transferrable, non-refundable tax credit with a ten-year carry-forward period, shared by five states. However, the most average combination would be a transferable, non-refundable tax credit with a five-year carry-forward period as five years is much closer to the mean and median carry-forward periods of

[254] *Id.* at 31.
[255] *Id.* at 32.
[256] *Id.* at 31.
[257] *Id.*
[258] *Id.*

6.1 years and five years respectively. Four states have adopted this average arrangement. Amongst these four states, Connecticut's historic rehabilitation tax credit is the most average when the above discussed credit value factors are added for consideration.[259]

iii. *Credit Applicability*

In terms of applicability of the credit to particular tax liability, the most common tax against which the historic rehabilitation credits can be applied is state income tax, which is true in thirty states. Fourteen states allow credits against some form of an insurance premiums tax, nineteen states allow credit against some form of business franchise tax, and seven states allow credits for taxes that do not fall neatly into any of the previously stated categories. The State of Maryland allows credits to be applied against the complete state tax liability of a credit holder[260] and is the only state that does so. The average number of taxes against which these credits can be applied is two credits (2.47) though credit against only one tax is the most common arrangement. Amongst states with credits of limited applicability,[261] Connecticut's credit is applicable against the largest number of taxes at ten distinct taxes.[262] The most average arrangement of credit applicability is a tax credit against state income and business franchise taxes, used by seven states.

---

[259] *Id.* at 12.

[260] MD. CODE ANN. STATE FIN. & PROC. § 5A-303 (LEXIS through Chapters 1, 2, 7, 8, 13 and 15 of the 2019 Reg. Sess. of the General Assemb.).

[261] Meaning, not Maryland, because its historic rehabilitation credit is applicable to the complete state tax liability of the credit holder.

[262] CONN. GEN. STAT. § 10-416c (LEXIS through the 2019 First Reg. Sess.).

iv. *The Spectrum of State Historic Rehabilitation Credits*[263]

Amongst the seven states that conform to the average applicability structure discussed in the previous paragraph, Louisiana would have the centermost tax credit when tax credit use and value factors are included in the evaluation. So, it can be said that Louisiana's historic preservation tax credit is the closest to representing the average credit of this kind amongst the several states that have such a credit.[264] Turning to the most abnormal tax credits within this group, the most powerful tax credit all around is, or rather was, the lingering remains of Michigan's historic rehabilitation tax credit which stopped certifying new projects in 2012.[265] This credit program offered a 25% tax credit without limits as to project size or annual statewide tax credit value; the credit was transferable, refundable, and had a ten year carry-forward if the creditholder's income tax, insurance premiums tax, business franchise tax, and state sales tax liability was less than the value of the credit.[266] The least valuable historical rehabilitation tax credit is New Mexico's credit program which is a non-transferrable, non-refundable tax credit with a four year carry-forward period.[267] New Mexico's credit is only applicable against the state's corporation income tax and while it may be a credit for up to 50% of qualified rehabilitation expenses, the project had better be a small one for the credit holders sake because most projects are capped at a credit of $25,000 while some may receive up to $50,000.[268] Ohio's historic rehabilitation tax credit is of above average value to a potential tax

---

[263] To reach the conclusions presented in this sub-section, I (i) determined the most common applicability arrangement for these credits. Then (ii) from the universe of state credits with that arrangement, I determined which credits also were arranged in accord with the most common usability arrangement. And (iii) amongst those credits I chose the closest credit to the means of the valuation factors. For the hyperbolic credits, I repeated the above process but looking for the widest/most narrow applicability, then most/least usable and most above/below the mean value factors. I chose this method because it proceeds from the most binary set of factors to the most variable, which seemed to be the best way of achieving a conclusion that was not arbitrary.
[264] *See* LA. STAT. ANN. § 47:6019 (LEXIS current through all 2018 legis.); NATIONAL TRUST, *supra* note 105, at 31.
[265] MICH. COMP. LAWS § 206.266 (2012).
[266] *Id.*
[267] NATIONAL TRUST, *supra* note 105, at 12, 31.
[268] N.M. STAT. ANN. § 7-2A-8.6 (LEXIS through Chapter 43 of the 54th Leg.'s 2019 Reg. Sess.); NATIONAL TRUST, *supra* note 105, at 31.

payer as it has a higher percentage value, and is usable against a broader range of tax liability than the Louisiana historic rehabilitation tax credit, though it is similar in its value limits and its usability.[269]

C. *New Markets Tax Credits*

1. *The Federal New Markets Tax Credit*

In 2000, the U.S. Congress acted upon bipartisan compromise amongst members who opposed strong taxation and members who supported efforts by the government to develop communities and alleviate poverty to create the New Markets Tax Credit (NMTC).[270] The credit operates by certifying investment entities called Community Development Entities (CDEs) that take in funds from investors to be invested in low-income communities by the CDE.[271] The CDEs are certified based upon proven expertise and knowledge about the low-income community or area in which they operate.[272] A low-income community is defined in as an area where the median household income is less than or equal to 80% of median income in the state or metropolitan area in which the community is located or where the poverty rate is in excess of 20%.[273] Taxpayers who invest funds into a qualified CDE receive a credit from that CDE "equal to 5% of its equity investment in the CDE for each of the first three years and a 6% credit for each of the next four years (39% total)."[274] Most commercial developments located within a low-income community are permissible recipients for CDE investments or loans, though residential developments are not a permitted use of tax credit eligible investment funds.[275] The Federal NMTC provided in excess of $30 billion in tax credits for qualified investments between its enactment

---

[269] *See* OHIO REV. CODE ANN. § 149.311 (LEXIS through legis. Passed by the 133rd General Assemb. and filed with the Secretary of State through file 1 (H.B. 86)); LA. STAT. ANN. § 47:6019 (LEXIS current through all 2018 legis.); NATIONAL TRUST, *supra* note 105, at 31.

[270] Clinton G. Wallace, *The Case for Tradable Tax Credits*, 8 N.Y.U. J.L. & Bus. 227, 242-243 (2011).

[271] *Id.*

[272] *See New Markets Tax Credit Program Summary*, NOVAGRADOC & CO. LLP, https://www.novoco.com/resource-centers/new-markets-tax-credits/nmtc-basics/new-markets-tax-credit-program-summary (last visited Nov. 28, 2018). (hereinafter *NMTC Program Summary*).

[273] Wallace, *supra* note 269.

[274] *NMTC Program Summary*, *supra* note 271.

[275] *Id.*

in 2000 and 2011.[276] Since the creation of this federal tax credit program, thirteen states have created comparable state level tax incentives and two additional states have proposed tax credits of this kind being considered.[277]

2. *State Implementation of New Markets Tax Credits*

State	Qualified Investment Credit Amount	Taxes to Which Credit May be Applied	Sale, Transfer, and Refund or Carry Forward of Credits
Alabama	50% of Qualified Investment Value (QIV) creditable over 7 years at 8.33% annually in years 2-7.[278] Limited to $20 million in utilizable credits statewide in a given tax year.[279]	Life insurance premium tax, banking excise tax, personal income tax, and corporate income tax[280]	Non-transferrable, unlimited carryforward but non-refundable[281]

[276] Wallace, *supra* note 269.
[277] *State NMTC Programs*, NOVAGRADOC & CO. LLP, https://www.novoco.com/resource-centers/new-markets-tax-credits/application-allocation/state-nmtc-programs (last visited Nov. 28, 2018).
[278] ALA. CODE § 41-9-218 (LEXIS through Acts 2019, No. 19-12).
[279] ALA. CODE § 41-9-219.2 (LEXIS through Acts 2019, No. 19-12).
[280] ALA. CODE § 41-9-218.
[281] ALA. CODE § 41-9-219.1 (LEXIS through Acts 2019, No. 19-12).

Alaska	Businesses which receive an equity investment from a CDE under the Federal NMTC are eligible to receive either a guarantee on a business loan or a loan from the State of Alaska to support economic development, limited to $40 million in obligations at any time.[282]	Not Applicable	Not Applicable

[282] ALASKA STAT. §§ 44.88.700, .760 (LEXIS through 2018 SLA, all legislation).

Arkansas	58% of QIV creditable over 7 years at 12% annually in years 3-5 and 11% annually in years 6-7.[283] The total statewide value of tax credits cannot exceed the value of unallocated revenues from the state insurance premium tax.[284]	Insurance premium tax[285]	Non-transferrable, non-refundable,[286] 9-year carry forward period[287]

[283] ARK. CODE ANN. §15-4-3603 (LEXIS through Act 620 of the 2019 Reg. Sess. (except Acts 288, 315, 377-394, 545, 552, 577 sec. 4, and 597), and also including Acts 624, 633, and other laws effective through Apr. 3, 2019 of the 2019 Reg. Sess.).
[284] *Id*.
[285] ARK. CODE ANN. §15-4-3602 (LEXIS through Act 620 of the 2019 Reg. Sess. (except Acts 288, 315, 377-394, 545, 552, 577 sec. 4, and 597), and also including Acts 624, 633, and other laws effective through Apr. 3, 2019 of the 2019 Reg. Sess.).
[286] ARK. CODE ANN. §15-4-3604 (LEXIS through Act 620 of the 2019 Reg. Sess. (except Acts 288, 315, 377-394, 545, 552, 577 sec. 4, and 597), and also including Acts 624, 633, and other laws effective through Apr. 3, 2019 of the 2019 Reg. Sess.).
[287] ARK. CODE ANN. §15-4-3603.

Florida	39% of QIV creditable over 7 years at 7% in year 3 and 8% annually in years 4-7.[288] Limited to $36.6 million in utilizable credits statewide in a given tax year and limited further to $216.34 million in credits over the life of the program.[289]	Personal income tax and insurance premium tax[290]	Transferable, non-refundable, 5-year carry forward period[291]

[288] FLA. STAT. § 288.9916 (LEXIS through the 2018 Second Reg. Sess. of the 25th Leg.).
[289] FLA. STAT. § 288.9914 (LEXIS through the 2018 Second Reg. Sess. of the 25th Leg.).
[290] *Id.*
[291] *Id.*

Illinois	39% of QIV creditable over 7 years at 7% in year 3 and 8% annually in years 4-7.[292] Limited to $20 million in utilizable credit statewide in a given tax year.[293]	Personal income tax, business franchise tax, and insurance premium tax[294]	Non-transferable, non-refundable 5-year carry forward period[295]
Kentucky	39% of QIV creditable over 7 years at 7% in year 3 and 8% annually in years 4-7.[296] Limited to $10 million in utilizable credit statewide in a given tax year.[297]	Personal income tax, corporate income tax, limited liability entity income tax, domestic insurance taxable capital tax, insurance premium taxes, attorney interinsurance contracts tax, retaliatory tax[298]	Non-transferable, non-refundable, unlimited carry forward[299]

[292] 20 ILL. COMP. STAT. 663/5 (LEXIS through P.A. 101-2 of the 2019 Reg. Sess. of the 101st General Assemb.).
[293] 20 ILL. COMP. STAT. 663/20 (LEXIS through P.A. 101-2 of the 2019 Reg. Sess. of the 101st General Assemb.).
[294] 20 ILL. COMP. STAT. 663/5.
[295] 20 ILL. COMP. STAT. 663/15 (LEXIS through P.A. 101-2 of the 2019 Reg. Sess. of the 101st General Assemb.).
[296] KY. REV. STAT. ANN. § 141.432 (LEXIS through emergency legis. through Acts 2019 Chapter 32).
[297] KY. REV. STAT. ANN. § 141.434 (LEXIS through emergency legis. through Acts 2019 Chapter 32).
[298] KY. REV. STAT. ANN. § 141.432.
[299] KY. REV. STAT. ANN. § 141.434.

Louisiana	2002 – 2013 NMTC 45% of QIV creditable over 7 years at 10% in years 1-2 and 5% annually in years 3-7.[300] Limited to $50 million in utilizable credits statewide over the life of the tax credit, which in the period post January 1, 2011 includes only unissued, recaptured, or disallowed but pre-existing funds for the credit.[301] Louisiana sunset this tax credit program on December 31, 2013.[302]	2002 – 2013 NMTC Personal income tax, state corporate income tax, state corporate franchise tax[303]	2002 – 2013 NMTC Transferrable, non-refundable, 10-year carry forward period[304]

[300] LA. STAT. ANN § 47:6016 (LEXIS through all 2018 legis.).
[301] *Id.*
[302] *Id.*
[303] LA. STAT. ANN § 47:6016.1 (LEXIS through all 2018 legis.).
[304] LA. STAT. ANN § 47:6016.

Louisiana Continued	2014 - Present NMTC 45% of QIV creditable over 7 years at 14% in years 1-2 and 8.5% annually in years 3-4, and 0% annually in years 5 -7.[305] Limited to $55 million in utilizable credits statewide over the life of the tax credit program.[306]	2014 – Present NMTC Insurance premium tax[307]	2014 – Present NMTC Transferrable, non-refundable, 10-year carry forward period[308]

305 *Id.*
306 *Id.*
307 *Id.*
308 LA. STAT. ANN § 47:6016.1.

Maine	39% of QIV creditable over 7 years at 7% in year 3 and 8% annually in years 4-7.[309] Limited to $20 million in utilizable credits statewide in a given tax year and limited further to $250 million in credits outstanding for any seven-year period.[310]	All insurance taxes[311]	Non-transferrable, refundable, 20-year carry forward period[312]

[309] ME. REV. STAT. ANN. tit. 36, § 5219-HH (LEXIS through Chapter thirty-five of the First Reg. Session of the 129th Me. Leg. Sess.).
[310] ME. REV. STAT. ANN. tit. 10, § 1100-Z (LEXIS through Chapter thirty-five of the First Reg. Session of the 129th Me. Leg. Sess.).
[311] ME. REV. STAT. ANN. tit. 36, § 2533 (LEXIS through Chapter thirty-five of the First Reg. Session of the 129th Me. Leg. Sess.).
[312] ME. REV. STAT. ANN. tit. 36, § 5219-HH.

Mississippi	24% of QIV creditable over 7 years at 8% annually in years 1-3 and 0% annually in years 4-7.[313] Limited to $15 million in utilizable credits statewide in a given tax year.[314]	Personal income tax, state corporate income tax, state domestic insurance premium tax, state foreign insurance premium tax, and retaliatory tax on insurance companies[315]	Non-transferrable, non-refundable, 7-year carry forward period[316]
Nebraska	39% of QIV creditable over 7 years at 0% in years 1-2 and 7% in year 3 and 8% annually in years 4-7.[317] Limited to $15 million in utilizable credits statewide in a given tax year.[318]	Domestic and foreign insurance premium tax, state financial institutions franchise tax, state sales tax, state corporate income tax, state sale and use tax[319]	Non-transferrable, non-refundable, 5-year carry forward period[320]

313 MISS. CODE ANN. § 57-105-1 (LEXIS through laws approved by the Governor through March 26, 2019, not including changes and corrections made by the J. Legis. Comm. on Compilation, Revision and Publication of Legis.).
314 *Id.*
315 *Id.*
316 *Id.*
317 NEB. REV. STAT. § 77-1103 (LEXIS through the 2019 reg. sess. of the 106th Leg. First Sess. acts).
318 NEB. REV. STAT. § 77-1115 (LEXIS through the 2019 reg. sess. of the 106th Leg. First Sess. acts).
319 NEB. REV. STAT. § 77-1112 (LEXIS through the 2019 reg. sess. of the 106th Leg. First Sess. acts).
320 NEB. REV. STAT. § 77-1114 (LEXIS through the 2019 reg. sess. of the 106th Leg. First Sess. acts).

Nevada	58% of QIV creditable over 7 years at 0% in years 1-2 and 12% in years 3-5 and 11% annually in years 6-7.[321] Limited to $200 million in utilizable credits statewide over the lifetime of the tax credit.[322]	Insurance Premium Tax (covering both foreign and domestic insurance companies) and state retaliatory tax[323]	Non-transferrable, non-refundable,[324] unlimited carry forward period[325]

[321] NEV. REV. STAT. § 231A.040 (LEXIS through Chapter 2 of the 80th Reg. Sess. (2019)).
[322] NEV. REV. STAT. § 231A.230 (LEXIS through Chapter 2 of the 80th Reg. Sess. (2019)).
[323] NEV. REV. STAT. § 231A.080 (LEXIS through Chapter 2 of the 80th Reg. Sess. (2019)).
[324] NEV. REV. STAT. § 231A.210 (LEXIS through Chapter 2 of the 80th Reg. Sess. (2019)).
[325] NEV. REV. STAT. § 231A.200 (LEXIS through Chapter 2 of the 80th Reg. Sess. (2019)).

Utah	58% of QIV creditable over 7 years at 0% in years 1-2 and 12% in years 3-5 and 11% annually in years 6-7.[326] Limited to $50 million in in years 6-7.[327] Limited to $50 million in utilizable credits statewide over the lifetime of the tax credit.[328]	Insurance Premium Tax (covering both foreign and domestic insurance companies) and state retaliatory tax[329]	Non-transferrable,[330] non-refundable, 7-year carry forward period[331]

3. *Ohio's New Markets Tax Credit*

The Ohio New Markets Tax Credit (ONMTC) was developed to pursue similar aims to the Federal New Markets Tax Credit, namely to incentivize investment into communities with weak economic growth and low-incomes which may not otherwise attract significant investors. [332] The State of Ohio has allocated $10 million in each fiscal year for the ONMTC and limits statewide credits by the Director of Development Services accordingly.[333] The tax credit may be claimed by domestic insurance companies[334] and foreign insurance

---

[326] UTAH CODE ANN. § 63N-2-602 (LEXIS through the 2018 Third Spec. Sess.).
[327] UTAH CODE ANN. § 63N-2-602 (LEXIS through the 2018 Third Spec. Sess.).
[328] UTAH CODE ANN. § 63N-2-603.
[329] UTAH CODE ANN. § 59-9-107 (LEXIS through the 2018 Third Spec. Sess.).
[330] UTAH CODE ANN. § 63N-2-603 (LEXIS through the 2018 Third Spec. Sess.).
[331] UTAH CODE ANN. § 59-9-107.
[332] *Ohio New Markets Tax Credit Program*, OHIO DEV. SERVS. AGENCY, https://development.ohio.gov/cs/cs_onmtcredit.htm (last visited Jan. 12, 2019).
[333] OHIO REV. CODE ANN. § 5725.33 (LEXIS through legis. Passed by the 133rd General Assemb. and filed with the Secretary of State through file 1 (H.B. 86)).
[334] *Id.*

companies[335] against their respective insurance premium taxes, corporations against the state's corporation franchise tax,[336] and by financial institutions against the state's financial institutions franchise tax.[337] These entities purchase the credits from Community Development Entities who receive allocations of credits from the state.[338] The tax credit is valued at 39% of the investors qualified investment over a seven year period at 0% in the first two years, seven percent in the third year, and 8% in the years four through seven.[339] The credit is non-refundable but may be carried forward for a period of four years or transferred to another taxpayer with eligible tax liability.[340]

4. *A Big Picture of State New Market Tax Credits*[341]

i. *Credit Value*

Looking to the data from the few states which have created their own version of this relatively new style of tax credit, most states have adhered closely to the parameters adopted by the federal government for its tax credit, a 39% credit incrementally awarded to taxpayers over a seven-year period.[342] Half of the twelve states with a new markets tax credit use this formulation with five states offering credit for a higher percentage of qualified investment and one state offering less. The mean percentage value of state new market tax credits (NMTCs) is 43%, while the median and modal values are the oft-repeated 39%. The highest value credits are creditable for 58% and are enacted in

---

[335] OHIO REV. CODE ANN. § 5729.16 (LEXIS through legis. Passed by the 133rd General Assemb. and filed with the Secretary of State through file 1 (H.B. 86)).
[336] OHIO REV. CODE ANN. § 5733.58 (LEXIS through legis. Passed by the 133rd General Assemb. and filed with the Secretary of State through file 1 (H.B. 86)).
[337] OHIO REV. CODE ANN. § 5726.54 (LEXIS through legis. Passed by the 133rd General Assemb. and filed with the Secretary of State through file 1 (H.B. 86)).
[338] *Ohio New Markets Tax Credit Program*, *supra* note 330.
[339] OHIO REV. CODE ANN. § 5725.33 (LEXIS through legis. Passed by the 133rd General Assemb. and filed with the Secretary of State through file 1 (H.B. 86)).
[340] *Id*.
[341] Data contained and analyzed in this section will be pulled from the above chart of State New Market Tax Credits, *supra* pp. 35–43, and the paragraph discussing Ohio's tax credit, *supra* Part III.C.3.
[342] *NMTC Program Summary*, *supra* note 271.

Arkansas,[343] Nevada,[344] and Utah.[345] The lowest value credit comes from Mississippi and allows taxpayers 24% of qualified investments as a credit.[346] Eight states place annual limits on the amount of certifiable credits with a mean limitation of just over $18 million ($18.23 million) with the median and modal values for the data set at $20 million. The smallest programs on an annual basis belong to Ohio[347] and Kentucky[348] with $10 million annual caps. The largest program would be Arkansas which functionally has neither a limit on annual credits certified or on lifetime credit value for its program save for the sum revenues to the state from its insurance premiums tax.[349] Amongst states with an annual limitation the largest ceiling belongs to Florida at $36.6 million in authorized credits annually.[350] Five states limit NMTCs at the program level with a mean lifetime limit of just over $154 million ($154.268 million) and a median limit of $200 million. The largest program limit belongs to Maine at $250 million[351] and the smallest is Utah's credit which is capped at $50 million over the life of the program. Illinois has the most average tax credit in terms

343 ARK. CODE ANN. §15-4-3603 (LEXIS through Act 620 of the 2019 Reg. Sess. (except Acts 288, 315, 377-394, 545, 552, 577 sec. 4, and 597), and also including Acts 624, 633, and other laws effective through Apr. 3, 2019 of the 2019 Reg. Sess.).

344 NEV. REV. STAT. § 231A.040 (LEXIS through Chapter 2 of the 80th Reg. Sess. (2019)).

345 UTAH CODE ANN. § 63N-2-602 (LEXIS through the 2019 Third Spec. Sess.).

346 MISS. CODE ANN. § 57-105-1 (LEXIS through laws approved by the Governor through March 26, 2019, not including changes and corrections made by the J. Legis. Comm. on Compilation, Revision and Publication of Legis.).

347 OHIO REV. CODE ANN. § 5725.33 (LEXIS through legis. Passed by the 133rd General Assemb. and filed with the Secretary of State through file 1 (H.B. 86)).

348 KY. REV. STAT. ANN. § 141.434 (LEXIS through emergency legis. Through Acts 2019 Chapter 32).

349 ARK. CODE ANN. §15-4-3603 (LEXIS through Act 620 of the 2019 Reg. Sess. (except Acts 288, 315, 377-394, 545, 552, 577 sec. 4, and 597), and also including Acts 624, 633, and other laws effective through Apr. 3, 2019 of the 2019 Reg. Sess.).

350 FLA. STAT. § 288.9914 (LEXIS through the 2018 Second Reg. Sess. of the 25th Leg.).

351 ME. REV. STAT. ANN. tit. 10, § 1100-Z (LEXIS through Chapter thirty-five of the First Reg. Session of the 129th Me. Leg. Sess.) It should be noted that this amount is even larger than it appears because Maine's programmatic limitation is based upon a rolling seven-year window rather than the all-time life of the tax credit program.

of credit value with its credit adhering to both the median amount of qualified investment creditable and annual credit limits.[352]

ii. *Credit Usability*

Having established the parameters for the valuation of state NMTCs the next consideration is how usable those credits are to taxpayers holding these credits. While every state with a new market tax credit offers some kind of carry-forward (three offer unlimited carry-forward)[353] the story in terms of transferability and refundability is very limited indeed. Only three states allow transfer of the credits; Florida,[354] Louisiana,[355] and Ohio.[356] Only one state, Maine, has enacted a refundable tax credit for qualified investments in a CDE.[357] Amongst the states with a limited ability for the credit-holder to carry-forward unused tax credits the mean length of authorized carry forward is eight years, the median is seven years, but the most common carry-forward length is five years. Amongst states with limited carry-forward Maine offers the longest allowance at twenty years[358] while Ohio has the most limited offering at just four years.[359] Two states have credits that are non-transferrable, non-refundable, and have carry-forward periods which are central in the data set, Mississippi[360] and Utah.[361] However, it is hard to find a state which is both structured on the factors discussed in this paragraph which is also valued in the

---

352 20 ILL. COMP. STAT. 663/5, /20 (LEXIS through P.A. 101-2 of the 2019 Reg. Sess. of the 101st General Assemb.).

353 ALA. CODE § 41-9-219.1(LEXIS through Acts 2019, No. 19-12); KY. REV. STAT. ANN. § 141.434 (LEXIS through emergency legis. through Acts 2019 Chapter 32); NEV. REV. STAT. § 231A.200 (LEXIS through Chapter 2 of the 80th Reg. Sess. (2019)).

354 FLA. STAT. § 288.9916 (LEXIS through the 2018 Second Reg. Sess. of the 25th Leg.).

355 LA. STAT. ANN § 47:6016.1 (LEXIS through all 2018 legis.).

356 OHIO REV. CODE ANN. § 5725.33 (LEXIS through legis. Passed by the 133rd General Assemb. and filed with the Secretary of State through file 1 (H.B. 86)).

357 ME. REV. STAT. ANN. tit. 36, § 5219-HH (LEXIS through Chapter thirty-five of the First Reg. Session of the 129th Me. Leg. Sess.).

358 *Id.*

359 OHIO REV. CODE ANN. § 5725.33.

360 MISS. CODE ANN. § 57-105-1 (LEXIS through laws approved by the Governor through March 26, 2019, not including changes and corrections made by the J. Legis. Comm. on Compilation, Revision and Publication of Legis.).

361 UTAH CODE ANN. §§ 59-9-107, 63N-2-603 (LEXIS through the 2019 Third Spec. Sess.).

middle of the data set because Mississippi has the lowest value tax credit of the group,[362] and Utah is tied for the highest value.[363]

iii. *Credit Applicability*

Turning now to applicability of these tax credits to the liability's respective state's eligible taxpayers, every state with an enacted NMTC allows credit against that state's insurance premiums tax. Six states allow credit against at least one state income tax, while only three states allow application against at least one state business franchise tax. The state tax credit with the widest applicability is Kentucky with seven unique taxes a taxpayer may apply the credit against.[364] The only state with authorized application against a state income tax, insurance premium tax, and a business franchise tax is Nebraska.[365] Arkansas allows an NMTC to apply only against the state's insurance premiums tax[366] and has the most limited credit in terms of applicability. Because a tax in this group is equally as likely as not to be applicable against its state's income tax and every state with an NMTC allows application against the state's insurance premiums tax it is futile to attempt to identify the most averagely applicable credit program amongst these states.

iv. *The Spectrum of State Historic Rehabilitation Credits*[367]

While the data paints a much less clear picture for the state new market tax credits than the data set of state historic rehabilitation tax credits, it is my contention that Alabama has the NMTC which is most central in the data set when considering value, usability, and applicability. While the value of Alabama's credit is high at 50%, its $20 million annual program limit is in line with the median of the

---

[362] MISS. CODE ANN. § 57-105-1.
[363] UTAH CODE ANN. § 63N-2-602 (LEXIS through the 2019 Third Spec. Sess.).
[364] KY. REV. STAT. ANN. § 141.432 (LEXIS through emergency legis. Through Acts 2019 Chapter 32).
[365] NEB. REV. STAT. § 77-1112 (LEXIS through the 2019 reg. sess. of the 106th Leg. First Sess. acts).
[366] ARK. CODE ANN. §15-4-3602 (LEXIS through Act 620 of the 2019 Reg. Sess. (except Acts 288, 315, 377-394, 545, 552, 577 sec. 4, and 597), and also including Acts 624, 633, and other laws effective through Apr. 3, 2019 of the 2019 Reg. Sess.).
[367] See *supra* note 262, for an explanation of the methodology used in this section.

data.[368] Alabama's credit is non-transferrable and non-refundable[369] (the most popular arrangement) and its unlimited carry-forward authorization[370] is tied with a five-year carry forward regime for the most popular structure (both used by three states), though it obviously far exceeds the mean years of carry-forward for the data set. Alabama allows taxpayers to apply credit for qualified equity investments against the state's income taxes, insurance premium tax, and a state excise tax on banking.[371] The most valuable overall credit from amongst those currently enacted is Kentucky.[372] The Bluegrass State comes in with a 39% non-refundable, non-transferrable tax credit with unlimited carry-forward applicable against the state's personal income tax, corporate income tax, limited liability entity income tax, domestic insurance taxable capital tax, insurance premium taxes, attorney interinsurance contracts tax, and its retaliatory tax on insurance companies.[373] The least valuable credit of the group belongs to Utah because of its limited application (only to the state's insurance taxes), its average carry-forward and its worst of the group program life limit on creditable value of fifty million dollars.[374] Ohio's new market tax credit is solidly in the middle of the road; its transferability is an advantage that very few state's offer, the value of the credit, its applicability to two state taxes are right in the middle of the pack, but the credit's worst of the bunch carry-forward and low annual credit value limit of ten million hold it back from being exceptional.[375]

---

368 ALA. CODE §§ 41-9-218, -219.2 (LEXIS through Acts 2019, No. 19-12).
369 ALA. CODE § 41-9-219.1 (LEXIS through Acts 2019, No. 19-12) .
370 *Id.*
371 ALA. CODE § 41-9-218.
372 A hard call, really strong arguments could be made that while less broadly applicable Maine credit is more useful overall because of its refundability, $20 million of available credits annually, and twenty years of carry forward, all of which beat Kentucky's offering. But, the applicability the Maine credit to only one class of tax payers (insurance companies) keeps it from getting the top spot here.
373 KY. REV. STAT. ANN. §§ 141.432, .434 (LEXIS through emergency legis. through Acts 2019 Chapter 32).
374 UTAH CODE ANN. §§ 59-9-107, 63N-2-603 (LEXIS through the 2019 Third Spec. Sess.).
375 OHIO REV. CODE ANN. §§ 5725.33, 5726.54, 5729.16, 5733.58 (LEXIS through legis. Passed by the 133rd General Assemb. and filed with the Secretary of State through file 1 (H.B. 86)).

IV. Ohio House Bill 469

A. *What is Proposed – As Introduced*

Ohio House Bill 469 (H.B. 469) begins with proposed amendments to Ohio Revised Code (O.R.C.) sections 107.036, 5725.98, and 5729.98.[376] In section 107.036, H.B. 469 provides for the new transformational mixed-use development tax credit to be reflected in reporting obligation imposed on the governor in his or her state budget proposal.[377] H.B. 469 specifies that these reports shall include that the amount of the tax credit authorized, expectations for claims of the credit, and surplus credits not expected to be used and that all of these data points shall be included in the main operating appropriations act each biennium.[378] In sections 5725.98 and 5729.98,, H.B. 469 adds the transformational mixed-use development tax credit to the schedule of claims to be made for credit against the taxes enacted in sections 5725.18 and 5720.03 respectively.[379]

H.B. 469 also proposes the enactment of three new sections of the Ohio Revised Code (O.R.C.) at sections 122.09, 5725.35, 5729.18.[380] In the proposed section 122.09(A), new terms are added to the O.R.C. and defined.[381] These terms include "Development Costs," which are defined as expenses for development of the transformational mixed-use development, including architectural and engineering costs as well as expenses pre-dating certification of the project for the tax credit.[382] "Owner," defined as one holding a fee simple or leasehold interest in real property but excluding any state agency or municipal entity.[383] And, most importantly, "Transformational mixed-use development" (TMUD), which is defined as "a site not exceeding seven acres that integrates some combination of retail, office, residential, hotel, recreation, structured parking, and other uses and that includes at least one building that is twenty or more stories in height."[384]

It is worth noting here that this definition is not the definition adopted by the Urban Land Institute to describe mixed-use

---

376 H.B. 469, 132nd Gen. Assemb., Reg. Sess. (Ohio 2018) (as introduced).
377 *Id.* § 107.036(A).
378 *Id.* § 5725.35(A).
379 *Id.*
380 *Id.* § 1.
381 *Id.* § 122.09(A).
382 *Id.* § 122.09(A)(1).
383 *Id.* § 122.09(A)(2).
384 *Id.* § 122.09(A)(4).

development generally which is, "Having 'three or more significant revenue-producing uses [commercial, entertainment, retail, and residential] with significant physical and functional integration (including uninterrupted pedestrian connections), and be developed in conformance with a coherent plan."[385] The authors of this legislation have made some choices narrowing the range of mixed-use development models that will qualify for this tax incentive. Specifically, note the requirement that a TMUD for purposes of this bill would only apply to a development with at least one twenty story or higher structure.[386] This size requirement lends itself heavily toward vertically integrated mixed-use development.[387] Further this bill has a radius requirement limiting the development to no more than seven acres,[388] a sufficiently compact requirement that horizontally integrated mixed-use development styles such as traditional neighborhood development and transit-oriented development, would largely be excluded from use of this credit.[389] Merely drawing an inference from these factors, one might conclude that the target of this legislation is primarily development in urban centers. Compactness being a valuable characteristic when the price of land is at a premium as is the case in the urban core of a city.

In the proposed section 122.09(B) of H.B. 469 the proposed language details the process of acquiring tax credit for development costs of transformational mixed-use development. That process begins with the owner of land in Ohio on which a transformational mixed-use development is planned that will exceed $400 million in total project cost at completion, applying for a tax credit certificate from the Director of the Ohio Development Services Agency (director).[390] The director then reviews the application, which consists of a description of the project including defined plans and drawings, financial documentation showing estimated costs and proposed funding sources, a schedule for the project, and an economic impact assessment of the project.[391] If approved, the director then would issue a preliminary statement of the projected tax credit at a value of ten percent of the projected development costs.[392] The director's approval statutorily

---

[385] James, *supra* note 30, at 3.
[386] Ohio H.B. 469 §122.09(A)(4) (as introduced).
[387] *See generally* URBAN LAND INSTITUTE, *supra* note 47.
[388] Ohio H.B. 469 § 122.09(A)(4) (as introduced).
[389] *See generally* Grant, *supra* note 15, at 73.
[390] Ohio H.B. 469 § 122.09(B) (as introduced).
[391] *Id.* § 122.09(B)(1)-(4).
[392] *Id.* § 122.09(C).

hinges on the director's estimation of a project's impact on "architecture, accessibility to pedestrians, retail entertainment and dining sales, job creation, property values, connectivity, and revenue from sales, income, lodging, and property taxes."[393] After approval, the property owner must make a report of project progress twelve months from preliminary approval issuance and a report showing funding stability at eighteen months.[394] A failure to do so may result in the credit being revoked.[395] Having received certification of eligibility for the credit, the property developer may acquire project funding by selling the credit to a buyer or buyers; such a sale comes with a requirement of notice to the director of the sale and the amount of the credit sold.[396] A buyer of the credit cannot resell the credit or any portion of it.[397] Upon completion of the development project, the property owner who initially applied for certification of the tax credit must certify to the director the total actual development costs as certified by a CPA.[398] The director will then issue credit certificates for ten percent of the actual development cost pro rata to all owners of portions of the certificate and notify the state tax commissioner of the exact amounts of credit that may be claimed by particular credit owners.[399]

In proposed section 5725.35 and section 5729.18, H.B. 469 specifies that the tax credit certificate issued by the director to purchasers of the credits described in section 122.09 entitles them to a tax credit against the taxes levied in section 5725.18 and section 5729.03 of the O.R.C..[400] Specifically these taxes are the State of Ohio's annual franchise tax for domestic insurance companies[401] and foreign insurance companies operating within the State of Ohio.[402] Holders of the credit may make their first claim to the value of the credit against these taxes in the calendar year specified on the tax credit certificate and for up to five years following that year.[403] This

---

393 *Id.*
394 *Id.* § 122.09(D).
395 *Id.*
396 *Id.* § 122.09(E).
397 *Id.*
398 *Id.* § 12209(F)(1).
399 *Id.*
400 *Id.* §§ 5725.35(A), 5729.18(A).
401 OHIO REV. COD ANN. § 5725.18 (LEXIS through legis. Passed by the 133rd General Assemb. and filed with the Secretary of State through file 1 (H.B. 86)).
402 *Id.*
403 Ohio H.B. 469 §§ 5725.35(A), 5729.18(A) (as introduced).

provision does not allow for any additional carry forward of this credit above and beyond the claimant insurance company's total tax obligation under the aforementioned taxes during that five year period.[404]

In summary, H.B. 469 proposes a tax credit against Ohio's insurance franchise taxes valued at ten percent of the total development costs of a TMUD which may be earned by the property owner of the development project and sold to an insurance company.[405] That insurance company may not resell the credit and has five tax years and from the year listed on the credit certificate to make use of the credit.[406]

B. *Ohio House Government Accountability and Oversight Committee Amendments*

In committee, substantial changes were made to H.B. 469, first, as introduced, the minimum development cost of a project that would qualify as a TMUD was $400 million.[407] For context, the John Hancock Center, the one hundred story pioneer of vertically Integrated mixed-use development[408] only cost $100 million at the time of its construction in the late 1960s.[409] However, in more modern development the Fifth + Broadway project currently underway in Nashville, Tennessee, which conforms closely to the physical size and mixed-use requirements of H.B. 469, is expected to cost $430 million for development upon its completion.[410] After the committee's mark-up on the bill this was reduced to $50 million.[411] This reduced threshold for project cost would allow for more projects to apply for tax credit support. For example, the planned twenty-eight-story Millennial Tower development in the RiverSouth neighborhood of Downtown Columbus, Ohio, which is projected to cost only $150

---

[404] *Id.* §§ 5725.35(A), 5729.18(A).
[405] *See generally id.*
[406] *See id.*
[407] *Id.* § 107.036(B).
[408] SCHWANKE ET AL., *supra* note 7, at 28–29.
[409] *360 Chicago*, WORLD FED'N OF GREAT TOWERS, https://www.great-towers.com/towers/john-hancock-center/ (last visited Nov. 29, 2018).
[410] Barbra Murray, *Skanska Extends Contract on $430M Nashville Project*, COM. PROP. EXEC. (Mar. 21, 2018), https://www.cpexecutive.com/post/skanska-extends-contract-on-430m-nashville-project/.
[411] JOE MCDANIELS, OHIO LEGIS. SERV. COMM'N., SUB. BILL COMPARATIVE SYNOPSIS H.B. 469 132ND GEN. ASSEMB. (2018), https://www.legislature.ohio.gov/download?key=9689&format=pdf.

million[412] despite meeting other criteria for the tax credit, as introduced. In the bill as introduced, to meet the minimum standard for credit certification a proposed mixed-use development had to include a twenty-or-more story building, after committee this was changed to a fifteen-story or 350,000 square foot limit.[413] Like the reduction in total project price this change should open up the possibility of a wider range of projects to qualify for the credit. Additionally, as introduced, H.B. 469 had a requirement that a development project have a site footprint smaller than seven acres total; in committee this requirement was simply removed.[414] The removal of this provision changes this tax credit into a tool for both horizontally and vertically integrated mixed-use projects. For example, as initially proposed, developments such as Nationwide Realty Investors' Grandview Yard would (at 125 acres)[415] have been excluded from tax credit support.

In addition to making the aforementioned changes to the legislation, the Ohio House Government Accountability and Oversight Committee added new provisions to the bill as well. These included, a showing by the property owner, that the estimated increased tax collections for the property on which the development is situated will exceed the amount of the credit as part of the application to the director for credit qualification.[416] This showing by the property owner of estimated increased tax collections requires calculation of projected taxes to be collected from the economic activity on the property over a five year period from the time the development would be completed, both as though the development was not pursued and as though the development had been completed, and operated during that five years with the difference constitution the estimated increased tax collections mentioned above.[417] H.B. 469 as introduced mandated the director to consider "architecture, accessibility to pedestrians, retail entertainment and dining sales, job creation, property values, connectivity, and revenue from sales, income, lodging, and property taxes" as factors in

---

[412] Tristan Navera, *Millennial Tower, Now at 28 Stories, Still Expected to Rise in RiverSouth*, COLUMBUS BUS. FIRST (Nov. 15, 2018), https://www.bizjournals.com/columbus/news/2018/11/15/millennial-tower-now-at-28-stories-still-expected.html.

[413] MCDANIELS, *supra* note 409.

[414] *Id.*

[415] *Grandview Yard*, NATIONWIDE REALTY INVS., https://nationwiderealtyinvestors.com/portfolio-item/grandview-yard/ (last visited Nov. 29, 2018).

[416] MCDANIELS, *supra* note 409.

[417] *Id.*

his determination that the proposed TMUD should be certified to receive the tax credit. [418] The committees amendment added two additional factors to this consideration.[419] The first is whether increased tax revenue incident to the development will offset the credit as discussed previously.[420] The second criterion is the likely "transformation impact" of the TMUD on its project area, with the developer given discretion to define, for the director's consideration, an area surrounding the development of no less than one quarter mile and no more than a mile in circumference.[421]

C. *The NuCLEus Development in Cleveland, Ohio*

In 2015 Stark Enterprises, along with its joint-venture partner J-Dek Investments Limited, acquired a parking lot and a series of adjacent parcels in downtown Cleveland in the area near Quicken Loans Arena and Progressive Field.[422] The NuCLEus development, if completed, could include more than 300,000 square feet of office space, more than 100,000 square feet of retail space, more than 1800 parking spaces, a hotel and market-rate apartments all within a self-contained fifty-four-story tower structure projected to cost $500 to $540 million upon completion.[423] Bob Stark views the development as a transformational mixed-use opportunity for downtown Cleveland that would demonstrate "the kind of architecture that lets the world know that Cleveland is back, and that Cleveland is in competition with Chicago and New York."[424]

Stark has had some difficulty raising funds to support the development, and critics of H.B. 469 allege that the tax credit is little more than a giveaway intended to contribute to making NuCLEus a reality. In fact, Stark did work with the bill's sponsor Kirk Shuring R-Canton on the legislation.[425] However, NuCLEus isn't the only

---

[418] H.B. 469 § 122.09(C), 132nd Gen. Assemb., Reg. Sess. (Ohio 2018) (as introduced).
[419] McDaniels, *supra* note 409.
[420] *Id.*
[421] *Id.*
[422] Jarboe, *NuCLEus Project*, *supra* note 3.
[423] *Id.*
[424] Michelle Jarboe, *Stark Enterprises Joint Venture Plans New Retail, Apartments, More on Gateway District Parking Lot*, Clev. Plain Dealer (Jan. 6, 2016), https://www.cleveland.com/business/index.ssf/2014/08/stark_enterprises_joint_ventur.html.
[425] Jarboe, *NuCLEus Project*, *supra* note 3.

development which has impacted the bill; Kenect Cleveland, a joint-venture between Scott-Wolstein and Akara Partners featuring low-rent micro-apartments, a movie theater, retail space, and co-working office space would likely qualify for the credit under its expanded definition of transformational mixed-use development as amended. A fact possibly due to Wolstein's advocacy.[426]

V. OHIO H.B. 469 IN CONTEXT

Ohio H.B. 469 is unique, at the time of writing there are no other states which have enacted a similar tax incentive for mixed-use development investments. As previously discussed, the "transformational" effect requirements of H.B. 469[427] and testimony by proponents attesting to the community revitalizing power of mixed-use development[428] both strongly suggest that this legislation is intended to promote the renaissance of otherwise economically stagnant or disadvantaged areas through the addition of mixed-use development. This legislation is also a credit to incentivize a particular kind of investment in real estate development.[429] Recognizing these attributes of the tax credit proposed in H.B. 469, the following compares H.B. 469 to the previously discussed new markets tax credits and historic rehabilitation tax credits which each share in part of the goals that H.B. 469 appears to pursue.

A. *Comparing Ohio's Proposed Incentive to Other States*

1. *New Markets Tax Credits*

New markets tax credit programs modeled after the federal NMTC program operate by incentivizing investments by taxpayers into a Community Development Entity (CDE) through an offering of tax credits for investment.[430] These CDE's then invest in the low-income

---

[426] Michelle Jarboe, *Plans for Flats East Bank Phase Three Include 309 Apartments, iPic Movie Theater*, CLEV. PLAIN DEALER (Jun. 29, 2018), http://realestate.cleveland.com/realestate-news/2018/06/plans_for_flats_east_bank_phas.html (last visited Nov. 6, 2018).
[427] Sub. H.B. 469, 132nd Gen. Assemb., Reg. Sess. (Ohio 2018) (as passed by the House).
[428] *Hearing on H.B. 469 Before the H. Comm. on Gov't Accountability and Oversight*, *supra* note 94 (statement of Kent Scarrett).
[429] Ohio Sub. H.B. 469 § 122.09(A)(4)(a) (as passed by the House).
[430] Wallace, *supra* note 269.

communities in which they operate, allowing businesses in those communities to develop, expand, hire, acquire new facilities, etc.[431] The new markets tax credit at the federal level is paid out to investors in CDE's over a period of seven years.[432] While the new market tax credit mainly results in real estate investments, those investments would be made by the CDE using funds acquired from credit-seeking investors in the CDE.[433] So it may appear there is an element of comparing apples to oranges when comparing H.B 469's proposed credit and new market tax credits generally. H.B. 469 provides credit directly to a developer (owner or lessor) of a project which can be sold to an insurance company (a taxpayer with qualified tax liability) to generate funds to be invested in the project by the developer as equity.[434] However, the credits are conceptually quite similar, both allow a source of capital to purchase a tax credit from an investor in a development project to allow that investor to invest. Though the end result for these two credits is slightly different, a new market tax credit reduces the risk of investing in low income communities by guaranteeing a return of a portion of capital via tax credit[435] (or in the case of a leveraged equity investment, a strong likelihood of return on capital via tax credit).[436] Whereas, the 10% of development cost credit in H.B. 469 operates to create a source of state-funded no-cost equity for qualifying projects because the developer can sell its credits to extract their value.[437]

The aforementioned being said, H.B. 469's credit for 10% of the development cost[438] pales in comparison to the percentage of qualified investment value which is creditable under the array of state new market's tax credits, the lowest value of which provides a credit for

---

[431] *See* Ted M. Handel, *The New Markets Tax Credit Program: New Tax Credits Will Level the Playing Field for Investments in Low-Income Areas*, 25 L.A. LAW. 13, 13–14 (Jan. 2003).
[432] *NMTC Program Summary*, *supra* note 271.
[433] *See generally* Wallace, *supra* note 269.
[434] Sub. H.B. 469, 132nd Gen. Assemb., Reg. Sess. (Ohio 2018) (as passed by the House).
[435] *See generally* Handel, *supra* note 429, at 16–17.
[436] Neal Hefferren, *New Markets Tax Credits: Understanding the Power of the NMTC Program,* PROP. METRICS (Jun. 19, 2017), https://www.propertymetrics.com/blog/2017/06/19/new-markets-tax-credits-nmtc/?utm_source=ActiveCampaign&utm_medium=email&utm_content=New+Markets+Tax+Credits+%28NMTC%29&utm_campaign=New+Markets+Tax+Credits+Program+%28NMTC%29.
[437] Ohio Sub. H.B. 469 (as passed by the House).
[438] *Id.*

24% of an investors qualified equity investment (QEI).[439] However, this low credit value has to be put in the context of the cash value of the TMUD tax credit proposed which would be a minimum of $5 million ($50 million minimum project development costs at a 10% rate).[440] By way of comparison two state's NMTC programs (including Ohio) are limited to annual credits of $10 million statewide.[441] H.B. 469's TMUD tax credit is only applicable against Ohio's insurance premium taxes[442] which puts it in line with five state NMTC programs.[443] Ohio H.B. 469 is transferrable from the developer to an eligible taxpayer if the developer is not itself liable for insurance premium taxes.[444] However, beyond this transfer to an eligible taxpayer, the credit may not be transferred again, making the TMUD credit functionally non-transferrable.[445] The TMUD credit would also be non-refundable and would have a carry forward of only five years as currently considered.[446] This lack of transferability and refundability is generally the norm amongst state NMTC programs.[447] However, only one state, Ohio, has an NMTC with shorter carry-forward.[448] The state NMTC programs that most closely resemble[449] H.B. 469's proposed TMUD tax credit are in the states of Utah and Arkansas both of which are at the bottom of available credits when

---

[439] MISS. CODE ANN. § 57-105-1 (LEXIS through laws approved by the Governor through March 26, 2019, not including changes and corrections made by the J. Legis. Comm. on Compilation, Revision and Publication of Legis.).
[440] Ohio Sub. H.B. 469 (as passed by the House).
[441] OHIO REV. CODE ANN. § 5725.33 (LEXIS through legis. Passed by the 133rd General Assemb. and filed with the Secretary of State through file 1 (H.B. 86)); KY. REV. STAT. ANN. § 141.434 (LEXIS through emergency legis. through Acts 2019 Chapter 32).
[442] Ohio Sub. H.B. 469 (as passed by the House).
[443] ARK. CODE ANN. §15-4-3602 (LEXIS, unofficially updated with laws effective through Act 620 of the 2019 Reg. Sess. (except Acts 288, 315, 377-394, 545, 552, 577 sec. 4, and 597), and also including Acts 624, 633, and other laws effective through April 3, 2019 of the 2019 Reg. Sess.); LA. STAT. ANN. § 47:6016.1 (LEXIS through all 2018 legis.); ME. REV. STAT. ANN. tit. 36, § 2533 (LEXIS through Chapter thirty-five of the First Reg. Session of the 129th Me. Leg. Sess.); NEV. REV. STAT. § 231A.080 (LEXIS through Chapter 2 of the 80th Reg. Sess. (2019)); UTAH CODE ANN. § 59-9-107 (LEXIS through the 2019 Third Spec. Sess.).
[444] Ohio Sub. H.B. 469 (as passed by the House).
[445] *See generally id*.
[446] *Id*.
[447] *See* chart *supra* pp. 35–43 (new market tax credits by state).
[448] OHIO REV. CODE ANN. § 5725.33 (LEXIS through legis. Passed by the 133rd General Assemb. and filed with the Secretary of State through file 1 (H.B. 86)).
[449] See *supra* note 262, for an explanation of the methodology.

applicability, usability and value are all considered.[450] In summary, H.B. 469's TMUD tax credit would be a very small tax credit[451] in terms of percentage of creditable investment compared to state NMTC programs,[452] a perceived weakness that is exacerbated by the proposed credits limited carry forward which and applicability to only one state tax liability.[453] However, the absolute monetary value of the proposed TMUD tax credit may render the low percentage value less important once an accounting is made for the limited scope of most state NMTC programs in terms of absolute dollars.[454]

2. *Historic Preservation Tax Credit*

The federal Historic Rehabilitation Tax Credit program and state programs modeled after it have much more in common structurally with the TMUD tax credit proposed in H.B. 469.[455] These credits allow the owner or lessor of the qualified project to certify its expenses in rehabilitation or development respectively and receive, as a credit against qualified tax liability, some portion of those expenses.[456] In terms of the percentage of expenses for which credit is available, only one state historic rehabilitation tax credit (HRTC) program offers less value, Montana.[457] However, as with the previously discussed comparison to state NMTC programs, it is important to consider the dollar value of these credits, the mean annual limit for HRTC credits with such a limitation is just over $21 million and the per project limitation for HRTC credits for those with that limit is just over $3 million.[458] So while the vast majority of state HRTC programs offer a higher percentage of expenses return than the proposed TMUD credit program, they are by and large limited to well below the absolute dollar value of the TMUD credit with four states having enacted annual HRTC credit limits equal to the minimum credit value for one TMUD project of $5 million.[459] The TMUD credit as proposed also falls short

---

[450] *Id.*
[451] Ohio Sub. H.B. 469 (as passed by the House).
[452] *See* chart *supra* pp. 35–43 (new market tax credits by state).
[453] Ohio Sub. H.B. 469 (as passed by the House).
[454] *See* chart *supra* pp. 35–43 (new market tax credits by state).
[455] Ohio Sub. H.B. 469 (as passed by the House); GREER, *supra,* note 78, at 148.
[456] Ohio Sub. H.B. 469 (as passed by the House); GREER, *supra,* note 78, at 148.
[457] NATIONAL TRUST, *supra* note 105, at 31.
[458] *See* chart supra pp. 14–28 (historic rehabilitation tax credits by state).
[459] Ohio Sub. H.B. 469 (as passed by the House); NATIONAL TRUST, *supra* note 105, at 30–32.

of most state HRTCs in terms of usability because the credit is functionally non-transferable and non-refundable[460] while eighteen states offer transferable credits, ten offer refundable credits; only nine states offer neither of these benefits for their HRTCs.[461] The TMUD credit is, however, in the middle of the pack when it comes to carry forward which averages six years amongst state HRTCs which have limited carry forward. The TMUD credit, if structured as an HRTC, would be in the minority in terms of applicability where the majority of states offer credits against two or more unique state taxes.[462] While Ohio's HRTC ranks highly amongst state HRTC programs when applicability, usability, and value are taken together,[463] the proposed TMUD program ranks near the very bottom, with its limited applicability and usability hindering it when compared to other states, though its comparatively significant value clearly mitigates this in a significant way.[464]

3. *Pennsylvania Mixed-use Development Credit*

Pennsylvania's tax credit program to support mixed-use development is not structured in the same way that tax credits such as the historic preservation tax credits previously discussed or the proposed TMUD tax credit in Ohio H.B. 469.[465] The program involves the authorized offering for sale of two million dollars in tax credits through a bidding process in blocks of no less than $500,000.[466] Credits purchased at these offerings may be applied against Pennsylvania state taxes on personal income, corporate net income, capital stock, business franchise, bank and trust company shares, title insurance company shares, insurance premiums, gross receipts, and mutual thrift institutions.[467] Funds generated by these sales are then awarded to mixed-use development projects which meet needs for

---

[460] Ohio Sub. H.B. 469 (as passed by the House).
[461] *See* chart *supra* pp. 14–28 (historic rehabilitation tax credits by state).
[462] Ohio Sub. H.B. 469 (as passed by the House); *see* chart *supra* pp. 14–28 (historic rehabilitation tax credits by state).
[463] See *supra* note 262, for an explanation of the methodology.
[464] See *supra* note 262, for an explanation of the methodology.
[465] Ohio Sub. H.B. 469 (as passed by the House); PA. HOUS. FIN. AGENCY, COMMUNITY REVITALIZATION FUND TAX CREDIT PROGRAM GUIDELINES (2018), [hereinafter PROGRAM GUIDELINES], https://www.phfa.org/forms/mudtc/2018_crf_program_guidelines_final.pdf.
[466] PA. HOUS. FIN. AGENCY, 2018 COMMUNITY REVITALIZATION FUND TAX CREDIT BID CRITERIA, https://www.phfa.org/forms/mudtc/2018_crf_bidcriteria_final.pdf.
[467] PROGRAM GUIDELINES, *supra* note 463, at 3.

affordable housing or for development of underserved commercial corridors.[468] Projects which received funding were all smaller developments ranging in total cost from just over $1.1 million to just over $7.3 million, with all projects in the size-range of no more than four stories.[469] Most projects which received funding in 2018 featured combined street level retail and apartment style residential space on upper floors, while some projects only featured one use, either residential or commercial.[470] As a reminder, "Mixed-Use" is defined by the Urban Land Institute as a development "having 'three or more significant revenue-producing uses [commercial, entertainment, retail, and residential], with significant physical and functional integration (including uninterrupted pedestrian connections), and be developed in conformance with a coherent plan.'"[471] Consequently, Pennsylvania's program is perhaps aptly not named a Mixed-use Development Tax Credit, but a Community Revitalization Fund which is more appropriate to its implementation even if not in line with the exact language used in the authorizing statute.[472]

In comparison, proposed TMUD credit in Ohio H.B. 469 is targeted at much larger projects than the Pennsylvania program, with statutory language limiting tax credit eligibility to projects with $50 million or more in development costs and fifteen or more stories.[473] Ohio's proposed tax credit program is also structured to drive investment by eligible taxpayers (insurance companies) to make investments in mixed-use developments in exchange for the credits, an approach of incentivizing market action.[474] This incentive for eligible taxpayers to invest in these projects is further enhanced by the provision of Ohio H.B. 469 that would not issue credits until the actual completion of the mixed-use development project,[475] the prospective credit holding insurance company has an incentive to see the project completed. Whether such a "skin in the game" effect will play out in reality is of course debatable, but at least facially it seems plausible

---

[468] *Id.*
[469] *See* PA. HOUS. FIN. AGENCY, 2018 COMMUNITY REVITALIZATION FUND PROGRAM PROJECT SUMMARIES, https://www.phfa.org/forms/mudtc/crf_awarded_project_summaries_2018.pdf.
[470] *Id.*
[471] James, *supra* note 30, at 3.
[472] 72 PA. CONS. STAT. § 8907-E (LEXIS through 2019 Reg. Sess. Act 1).
[473] Sub. H.B. 469, 132nd Gen. Assemb., Reg. Sess. (Ohio 2018) (as passed by the House).
[474] *Id.*
[475] *Id.*

that interested insurance company transferees might take an interest beyond the credit value in these credit eligible projects; insurance companies after all rely on their investment portfolios to support the high costs of underwriting and the competitive need to keep premiums low.[476] The Pennsylvania program allows a wider array of taxpayers to purchase tax credits as a standalone product which allows those interested in acquiring the credit to not be engaged in development,[477] intuitively this broadens the base for funding sources, but it does not promote the involvement of taxpayers with available capital in the development funding process for mixed-use developments, those who win credits in the bidding process have completed their involvement with the tax credit program.[478]

VI. ARGUMENTS FOR AND AGAINST OHIO H.B. 469

A. *Benefits of Mixed-Use Development*

1. *Economic Vitalization and Synergistic Uses*

The size and close integration of uses in the (more likely than not vertically integrated) mixed-use development projects which would fit the parameters of H.B. 469 allows for the vitalizing economic power of a self-sustaining first development in historically blighted areas of a city.[479] There are three kinds of market synergies which can result from closely integrated mixing of uses the first is that people who are on-site of the development for one use will choose to patronize businesses in the development, i.e. the office worker who patronizes the integrate restaurant or the hotel guest who shops at the integrated retail.[480] Mixed-use development encourages multipurpose visits where patrons engage with more than one use in a single trip.[481] Second is that the positive contribution that each mixed-use makes to the overall environment of the development increases the marketability of the space, which enhances the value of the

---

[476] *See How Insurance Works*, INS. INST. MICH., http://www.iiminfo.org/CONSUMERS/HowInsuranceWorks/tabid/1714/Default.aspx#collection (last visited, Jan. 17, 2019).
[477] *See* 72 PA. STAT. § 8907-E (LEXIS through 2019 Reg. Sess. Act 1).
[478] PROGRAM GUIDELINES, *supra* note 463.
[479] SCHWANKE ET AL., *supra* note 7, at 88.
[480] *Id.* at 88.
[481] *Id.* at 85.

development itself.[482] This is important because it enhances the generation of state and local tax revenues from the development as a result of increased property value, increased value of land adjacent to the development.[483] Further enhanced income for tenants and the developer as well as increased capital appreciation from mixed-use can result in larger tax revenues than single-use development would produce if similarly located.[484] Third, mixed-use developments, because of their size, can be place-making structures that overcome issues of a blighted location that might otherwise overwhelm a single-use development.[485] Further, mixed-use developments can help to support cultural and entertainment amenities which would not be able to support themselves individually; these amenities enhance the activity cycle of the development into the evenings and weekends and add the value that being a place of cultural significant adds to a development's rent seeking mission.[486] The amenities benefit from readily available sources of patrons from residents, visitors, and workers in the development as well as communications by those persons about the amenity.[487]

As H.B. 469 proceeded from introduction through committee mark-up by the Ohio House Government Accountability and Oversight Committee and passed through the Ohio House of Representatives, language was added to reflect a desire by the committee to see the Director of Development consider the positive economic and tax impacts and potential synergistic effects of credit applicant's developments.[488] The bill, as introduced, included considerations of enhanced accessibility for community members to the amenities of the project[489] while the house passed version of the bill includes requirements that the Director of Development consider the likelihood that the project will generate more tax value than the credits forego and the likelihood that the project will catalyze transformational economic growth in the area surrounding the project area.[490] These additionally required considerations should focus the

---

[482] *Id.* at 88.
[483] *Id.* at 126.
[484] *Id.*
[485] *Id.* at 88.
[486] *Id.* at 76–77, 88.
[487] *Id.* at 76–77.
[488] McDaniels, *supra* note 409.
[489] H.B. 469, 132nd Gen. Assemb., Reg. Sess. (Ohio 2018) (as introduced).
[490] Sub. H.B. 469, 132nd Gen. Assemb., Reg. Sess. (Ohio 2018) (as passed by the House).

Director of Development on projects which will maximize the benefits of mixed-use development discussed here.

2. *Compact Development and Environmental Benefits*

By its very nature, single use development where each use (commercial, residential, entertainment, etc.) is separated out into its own separate physical space will lead to a less dense sprawl of physical spaces.[491] This sprawl requires more physical infrastructure to support it (pipes, roads, wiring, etc.) because of the space that is covered.[492] This enhances the costs of providing public services to an area and increases the resource use from development.[493] Urban sprawl has also been identified as a cause of a host of other environmental harms including energy waste, poor air quality, and increased ambient air temperatures.[494] Mixed-use developments (and particularly the tightly integrated, likely single structure, mixed-use projects described by H.B. 469), simply by the virtue of their close integration of uses make smaller demands in material infrastructure to support. Additionally, their integrated uses create a steady stream of residents, workers, and visitors with arrival times spread throughout the course of the day all going to one location which makes for logistically simple and easily supportable public transit with the development as a center point.[495] Allowing individuals to access a range of uses in one location limits the need for individualized transportation and appurtenant congestion on the roads which furthers the environmental benefit of mixed-use development.[496]

The reduction of car-based commuting as a result of mixed-use development also has broader economic and social benefits which complement its environmental protection value.[497] Studies of neighborhoods in San Francisco have shown that reduction in overall traffic in an area increases the likelihood that residents develop friend and acquaintance relationships with fellow residents.[498] Mixed-use developments often include shared public spaces which serve to

---

[491] *See generally* JACOBS, *supra* note 25.
[492] DR. BASUDEB BHATTA, ANALYSIS OF URBAN GROWTH AND SPRAWL FROM REMOTE SENSING DATA 29 (2010).
[493] *Id.*
[494] *Id.* at 29–35.
[495] SCHWANKE ET AL., *supra* note 7, at 126.
[496] *See* Zamorano & Culpa, *supra* note 8.
[497] *Id.*
[498] *Id.*

integrate uses together via functional focal points.[499] These shared public spaces can be important catalysts for interactions among members of a community in environments with solely pedestrian traffic.[500] Mixed-use development adds economic value to an area because its integrated uses allow individuals to enter the area and act conveniently as pedestrians, this reduces the cost of transportation.[501] This creates additional foot traffic which, one study of pedestrians in London showed, leads to enhanced economic activity as pedestrians spend up to sixty percent more at businesses on a monthly basis than their car commuting peers.[502]

H.B. 469's language requiring structures of at least fifteen stories or 350,000 square feet of floor space as a central structure in the development, compact one quarter mile to one-mile project area limit, and integration of uses[503] arguably will qualify for tax credit support projects that embody the physical characteristics which generate the environmental, economic, and community building benefits described above.

B. *Tax Credit Support*

As described in H.B. 469, the mixed-use development projects that would be eligible for an enacted TMUD credit would be structures of significant size.[504] It is common knowledge that developments of fifteen or more stories tend to be more common in urban settings than in suburban settings[505] though there are of course examples of skyscraper-esque development in suburbs.[506] High cost urban land compounds on other challenges including construction in a confined area, and infrastructure that has not been updated to make development in an urban setting an expensive proposition.[507] These burdens are so significant that, "In some cases, a given MXD [mixed-use

---

[499] *See* SCHWANKE ET AL., *supra* note 7, at 4.
[500] Zamorano & Culpa, *supra* note 8.
[501] *Id.*
[502] *Id.*
[503] Sub. H.B. 469, 132nd Gen. Assemb., Reg. Sess. (Ohio 2018) (as passed by the House).
[504] *See generally id.*
[505] *See* SCHWANKE ET AL., *supra* note 7, at 123.
[506] *See* Blair Kamin, *Proposed Evanston Tower Bows to Suburban Atlanta's 'Queen'*, CHI. TRIB. (May 3, 2007), https://www.chicagotribune.com/news/ct-xpm-2007-05-03-0705010384-story.html.
[507] DALEY, *supra* note 83, at 172–173.

development] might not be built without public involvement, simply because financing, which is generally more complicated for MXDs than for single-use projects, could not be obtained without government assistance designed to help lower risk or costs for the private developer."[508] Mixed-use developments are large and complex developments which often take a great deal of time to develop, and all of these factors make the financing component of project development challenging and critical.[509]

C. *Criticisms of the Tax Credit*

There are two groups whose representatives have spoken in legislative hearings in opposition to H.B. 469, Policy Matters Ohio (PMO) and Americans for Prosperity Ohio (AFPO).[510] AFPO's primary objection is that these projects should not be the recipients of a tax credit because in their view, tax credits are ineffective, and because this particular tax credit appears to be in part motivated by a particular project which AFPO believes makes the entire program little more than corporate welfare which will distort the market for the worse.[511] While it is true that the credit is in part motivated by one particular legislators experience with a development that would benefit from this credit,[512] this initial inspiration does not mean that a wide array of projects which have the potential to provide taxpayers statewide with the benefits discussed in the previous paragraphs. The efficacy of tax credits generally is largely beyond the scope of this note. PMO's objections to H.B. 469 are less opposition to tax credits, generally, and more critical of the specifics of the TMUD tax credit program.[513] PMO is critical of the vague boundaries for the Director

---

[508] SCHWANKE ET AL., *supra* note 7, at 123.
[509] *See id.* at 113.
[510] *House Bill 469*, OHIO LEGISLATURE, https://www.legislature.ohio.gov/legislation/legislation-committee-documents?id=GA132-HB-469 (last visited Jan. 18, 2019).
[511] *See Hearing on H.B. 469 Before the H. Comm. on Ways and Means*, 132nd Gen. Assemb., Reg. Sess. (Ohio Dec. 5, 2018), (opponent testimony of Micah Derry, State Director, Americans for Prosperity Ohio), https://www.legislature.ohio.gov/legislation/legislation-committee-documents?id=GA132-HB-469.
[512] *See* Jarboe, *Plans for Flats*, *supra* note 424.
[513] *See Hearing on H.B. 469 Before the H. Comm. on Ways and Means*, 132nd Gen. Assemb., Reg. Sess. (Ohio Dec. 5, 2018), (opponent testimony of Zach Schiller & Wendy Patton, Policy Matters Ohio),

of Development Services' discretion to grant credits to TMUD projects, the lack of a claw-back provision in the bill, the lack of a requirement that a project would not go forward but for the tax credit, and the program's structure as a credit rather than a direct subsidy for TMUD projects.[514] The criticism that the TMUD credit should be restructured as a government expenditure doesn't hold any metaphorical water because, as scholars of American government would point out, a tax credit is the functional equivalent of an expenditure of government funds with the preferable characteristic of being historically more palatable to the American voter.[515] So in essence, six of one half dozen of another as the colloquialism goes.

Regarding the structure of the tax credit, a claw back provision in this legislation would likely be counterproductive. The first problem with this is that the credits are functionally required to be sold by the developer because the only eligible tax liability against which they are applicable comes from Ohio's tax on insurance premiums.[516] This means that recalling the credited value, which the developer likely has already sold would be punishing a taxpayer insurance company for the performance of a development it may have no other involvement in than having purchased the credits. Further, mixed-use developments are complex projects for which financing can be difficult to arrange because of the scale of the project;[517] claw back of value from the project has the potential to cause harm to the viability of the developers, and projects themselves, as a result. PMO's concerns about the lack of "guardrails"[518] come up against criteria in H.B. 469 which reflect broadly the perceived and proven benefits of mixed-use development and require a showing by the developer of intended positive tax value for the project area and transformational effect on the surrounding neighborhood.[519] Mixed-use developments tend to be amongst the largest development projects undertaken and constitute significant investments of time and capital for the developer.[520]

---

https://www.legislature.ohio.gov/legislation/legislation-committee-documents?id=GA132-HB-469.

[514] *Id.*

[515] GREER, *supra* note 78, at 112.

[516] *See* Sub. H.B. 469, 132nd Gen. Assemb., Reg. Sess. (Ohio 2018) (as passed by the House).

[517] *See* SCHWANKE ET AL., *supra* note 7, at 113.

[518] *Hearing on H.B. 469 Before the H. Comm. on Ways and Means*, *supra* note 511 (opponent testimony of Zach Schiller & Wendy Patton).

[519] *See* Ohio Sub. H.B. 469 (as passed by the House).

[520] *See* SCHWANKE ET AL., *supra* note 7, at 113.

Consequently, developers have significant incentives to ensure the successful completion, renting, and promotion of the project, all of which create value for the developer; [521] and through real estate taxes, income taxes levied on tenants, and other taxes for the State of Ohio.

D. *Mixed-use Development is Worth State Incentives*

Notwithstanding the criticisms discussed in the directly previous subsection the benefits of mixed-use development discussed herein are substantial. Because mixed-use developments are of such significant size and scale, they are more difficult to develop than single-use development projects which lack the many benefits that mixed-use can provide.[522] A tax credit incentive to lower the barrier to development of mixed-use development projects may make them a more attractive opportunity for developer's vis a vis single use development. And for the reasons discussed in the previous subsections this could have substantial economic, environment, and social benefits for the taxpayers of the State of Ohio.

E. *The Tax Credit as Proposed*

Turning to the form of the tax credit, as has been previously discussed, the credit valuation of ten percent of development expenditures is a small percentage when compared to percentage credit value for qualified equity investments under the state new market tax credit programs[523] or for qualified rehabilitation expenditures under the state historic rehabilitation tax credit programs.[524] However, the size of the projects contemplated by H.B. 469 (fifty million dollars or more) is substantial[525], and developers generally work to finance between seventy and ninety percent of project costs through construction and permanent debt, leaving between thirty and ten percent of project financing to the developer's equity contribution and investments by institutional equity investors.[526] A credit which allows the developer to offset ten percent of project developments costs would be of significant value to the developer, and has the capacity to make

---

[521] *See* Daley, *supra* note 83, at 3–4.
[522] SCHWANKE ET AL., *supra* note 7, at 123; Zamorano & Culpa, *supra* note 8.
[523] *See* chart *supra* pp. 35–43 (new markets tax credit by state).
[524] *See* chart *supra* pp. 14–28 (historic rehabilitation tax credit by state).
[525] Sub. H.B. 469, 132nd Gen. Assemb., Reg. Sess. (Ohio 2018) (as passed by the House).
[526] DALEY, *supra* note 83, at 33–34.

an otherwise infeasible project possible.[527] The value of the proposed TMUD tax credit in terms of absolute dollars is substantial, which allows it to avoid being overshadowed by Ohio's existing NMTC and HRTC both of which could accommodate mixed-use developments as creditable investments if they were respectively in a low-income community or associated with the rehabilitation of a qualified historic structure.[528] While the Ohio historic rehabilitation tax credit is refundable and the Ohio new markets tax credit is transferrable,[529] developers would still likely prefer the TMUD credit proposed in H.B. 469 because of its value in absolute dollars. However, while the proposed TMUD tax credit's value is substantial, its utilization for the developer is dependent upon sale of the credit an insurance company (a taxpayer with liability for Ohio's insurance premium tax).[530] The sheer size of the credit along with its non-transferability, non-refundability, and limited five year carry forward[531] may conspire to make the credit a hard sell to institutional investors who have may options, even amongst credit purchase investment in mixed-use development projects through state NMTCs and RHTCs where they have eligible tax liability.[532] Consequently, the legislature might consider either extending the carry forward, allowing transfer, or refundability of the credit to make it more attractive for eligible taxpayers to purchase from developers or it might consider widening the applicability of the credit to cover Ohio's corporation franchise or income taxes to widen the customer base for the proposed credit.

VII. CONCLUSION

Ohio H.B. 469's tax credit for qualified development expenses of a "transformation mixed-use development project"[533] would constitute a significant investment by the State of Ohio in a form of real estate development that addresses a variety of social and environmental problems. These result from single-use development, Euclidian

---

[527] *See* SCHWANKE ET AL., *supra* note 7, at 123.
[528] *See* OHIO REV. CODE ANN. §§ 149.311, 5725.33 (LEXIS through legis. Passed by the 133rd General Assemb. and filed with the Secretary of State through file 1 (H.B. 86)).
[529] *Id.*
[530] *See* Ohio Sub. H.B. 469 (as passed by the House).
[531] *Id.*
[532] *See* chart *supra* pp. 14–28 (historic rehabilitation tax credit by state); *see* chart *supra* pp. 35–43 (new markets tax credit by state).
[533] Ohio Sub. H.B. 469 (as passed by the House).

zoning, and urban sprawl that have been identified by scholars who study urban planning.[534] The credit is comparatively small to state new market tax credit programs and state historic tax credit programs in terms of rate of creditable expenses or investment[535] but, in terms of absolute dollars it offers a substantial value to developers[536] who may be incentivized to pursue mixed-use development with all of its appurtenant benefits despite the substantial investment and complex planning required by such an undertaking as a result of government incentive.[537] The credit's substantial value to developers could potentially be enhanced by a widened pool of qualifying tax liability to increase options for developers to sell their credit or adding an option for credit holders to transfer the credit or use it over a longer carry forward period than the currently proposed five years.[538] Regardless, it is the author's opinion that considering the benefits of mixed-use development, S.B. 39, which contains the language of H.B. 469 as passed by the Ohio House of Representatives,[539] should be passed by the Ohio Senate, reaffirmed by the Ohio House of Representatives and signed into law by Governor DeWine during the 2019 session.

---

[534] JACOBS, *supra* note 25; Stahl, *supra* note 21, at 1196; Zamorano & Culpa, *supra* note 8.
[535] *See* chart *supra* pp. 14–28 (historic rehabilitation tax credit by state); *see* chart *supra* pp. 35–43 (new markets tax credit by state).
[536] *See* Ohio Sub. H.B. 469 (as passed by the House).
[537] *See* SCHWANKE ET AL., *supra* note 7, at 88, 123.
[538] *See* Ohio Sub. H.B. 469 (as passed by the House); *see* chart *supra* pp. 14–28 (historic rehabilitation tax credit by state); *see* chart *supra* pp. 35–43 (new markets tax credit by state).
[539] S.B 39, 133rd Gen. Assemb., Reg. Session (Ohio 2019) (as introduced); H.B. 469, 132nd Gen. Assemb., Reg. Sess. (Ohio 2018) (as passed by the house).